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In the Matter of the Application of	:	Index No. 09-105100
NEW YORK CITY OPERA, INC.,	:	Hon. O. Peter Sherwood
	:	
Petitioner,	:	<b>NOTICE OF ENTRY</b>
	:	
For cy pres relief pursuant to Section 8-1.1(c) of the	:	
Estates, Powers and Trusts Law of the State of	:	
New York	:	
	:	
	:	
-----X	:	

PLEASE TAKE NOTICE that the within is a true copy of the order entered in the Clerk's Office for the County of New York on April 17, 2009.

By: Car W. Trowbridge  
Caroline W. Trowbridge

09340000001

## SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD  
*Justice*PART 61In the Matter of the Application of,  
NEW YORK CITY OPERA, INC.INDEX NO. 105100/09

Petitioner,

MOTION DATE \_\_\_\_\_

For cy pres relief pursuant to Section  
8-1.1 (c) of the Estates, Powers and  
Trusts Law of the State of New YorkMOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 7 were read on this petition for cy pres relief

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<b>FILED</b>	PAPERS NUMBERED
Answering Affidavits — Exhibits _____	<b>Apr 17 2009</b>	<u>1-6</u>
Replying Affidavits _____	<b>NEW YORK COUNTY CLERK'S OFFICE</b>	<u>7</u>

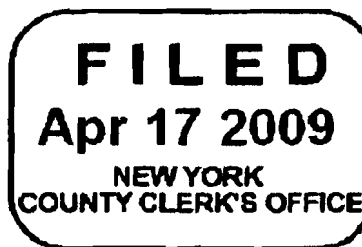
Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, the petition for cy pres relief pursuant to EPTL § 8-1.1 (c)  
is decided in accordance with the accompanying order.

Dated: April 15 2009

O. P. Sherwood  
O. PETER SHERWOOD, J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITIONCheck if appropriate: ☐ DO NOT POSTMOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):



SUPREME COURT OF THE STATE OF NEW YORK,  
COUNTY OF NEW YORK

-----X  
In the Matter of the Application of  
NEW YORK CITY OPERA, INC.,

Petitioner,

For cy pres relief pursuant to Section 8-1.1(c) of the  
Estates, Powers and Trusts Law of the State of  
New York.  
-----X

[~~PROPOSED~~] ORDER

Index No. 09-105100

Upon the annexed Petition for Cy Pres Relief Pursuant to Section 8-1.1(c) of the New York Estates, Powers and Trusts Law (the "Petition"), the Affidavit of Andrew D. Schau in Support of Application for Emergency Relief dated April 9, 2009, the Supplemental Affidavit of Andrew D. Schau dated April 9, 2009, and the exhibits annexed thereto, the Affidavit of Michael M. Kaiser dated March 31, 2009, and the accompanying Memorandum of Law, and sufficient cause appearing therefor; and

WHEREAS, the Attorney General of the State of New York, in his capacity as the representative of the ultimate charitable beneficiaries of a not-for-profit corporation operating in or under the laws of the State of New York, is a necessary statutory party;

WHEREAS, the Attorney General has provided an Affidavit of No Objection in support of the Prayer for Relief set forth in the Petition, its Affidavit conditioned on certain limitations to be set forth in the Order herein; and

WHEREAS, there are no persons interested in this proceeding other than Petitioner and the Attorney General, IT IS HEREBY

ORDERED that Petitioner is entitled to cy pres relief pursuant to Section 8-1.1(c) of the New York Estates, Powers and Trusts Law with respect to its petition regarding the

endowment fund held pursuant to an Agreement effective as of April 30, 2001 by and among the Lila Acheson and DeWitt Wallace Fund for Lincoln Center and City Opera, City Ballet, the Met, the Chamber Music Society of Lincoln Center, Inc., the Vivian Beaumont Theater, Inc., and the Philharmonic-Symphony Society of New York, Inc (such fund hereinafter, the "Wallace Fund"), as follows:

(a) Petitioner may borrow from the Wallace Fund (in addition to those amounts which Petitioner may expend pursuant to the terms of the Wallace Agreement and applicable law and the amounts it may borrow pursuant to the Order of this Court dated October 28, 2008) up to \$6,600,000 in order to fund its cash-flow needs during its 2008-2009 fiscal year and its 2009-2010 fiscal year.

(b) In addition to fulfilling its obligations under the October 28, 2008 Order, Petitioner shall restore to the Wallace Fund the net amounts borrowed from it pursuant to paragraph (a) as Petitioner has net financial resources that may be prudently used for that purpose consistent with the legal restrictions on the use of such resources.

(c) Petitioner shall submit a written annual report to the Attorney General of the State of New York (the "Attorney General") within six months after the close of each fiscal year of Petitioner ending on or after June 30, 2009 concerning the extent, if any, to which Petitioner, whether through contributions, accumulation of income, or capital appreciation, has during such fiscal year restored the value of the Wallace Fund as required by this Order and the Order of this Court dated October 28, 2008, such obligation to continue until such time as Petitioner can report that it has restored the amounts required by paragraph (b) and the October 28, 2008 Order.



(d) Petitioner's senior management shall provide to the Board of Directors or the Executive Committee of the Board of Directors a written report, not less often than once a month, concerning variances from the budget for the 2009-2010 fiscal year as such budget is in effect (and approved by the Board of Directors or the Executive Committee) from time to time.

(e) Petitioner's senior management shall provide to the Board of Directors or the Executive Committee of the Board of Directors, not less often than once every two weeks, an updated written cash-flow projection for the balance of the 2008-2009 fiscal year and for the 2009-2010 fiscal year.

(f) Petitioner for the balance of the 2008-2009 fiscal year and for the 2009-2010 fiscal year shall report periodically, but in no event less frequently than once a month, to an independent financial advisor concerning the strategic plan and financial plan that was previously developed in consultation with independent financial advisor Michael M. Kaiser, for the purpose of reviewing budget variances with the advisor, obtaining the advisor's assessment of the continued viability of such strategic plan and financial plan, and identifying alternative courses of action as warranted. The advisor retained for such purpose may continue to be Michael M. Kaiser or, alternatively, shall be another individual selected by Petitioner and approved by the Attorney General (such approval not to be unreasonably withheld).

(g) Petitioner's Board of Directors shall continue the on-going evaluation of the effectiveness of Petitioner's governance, financial and risk management, investment management policies practices, and systems of internal controls and, following consultation with the Attorney General, adopt appropriate enhancements thereto.

(h) Petitioner shall designate or retain a qualified individual to perform the roles and functions of chief financial officer.

(i) Petitioner for the balance of the 2008-2009 fiscal year and for the 2009-2010 fiscal year shall report periodically, but not less often than once per calendar quarter, to the Attorney General concerning its compliance with the terms of this Order and its projections concerning its anticipated ability to restore amounts to the Wallace Fund in accordance with this Order and the Order of this Court dated October 28, 2008.

Dated: April 15, 2009

ENTER:

  
J.S.C.

O. PETER SHERWOOD

Index No.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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In the Matter of the Application of  
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For cy pres relief pursuant to Section 8-1-1(c) of the  
Estates, Powers and Trusts Law of the State of New  
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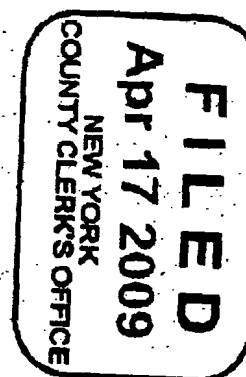
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[PROPOSED] ORDER

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Patterson Belknap Webb & Tyler LLP  
Attorneys for Petitioner

1133 Avenue of the Americas  
New York, New York 10036-6710  
Telephone: (212) 336-2000



SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
In the Matter of the Application of  
NEW YORK CITY OPERA, INC.,

Petitioner,

For cy pres relief pursuant to Section 8-1.1(c) of the  
Estates, Powers and Trusts Law of the State of  
New York.

Index No.

AFFIDAVIT OF NO  
OBJECTION ON BEHALF  
OF THE ATTORNEY  
GENERAL

-----X  
STATE OF NEW YORK     )  
                                  )ss.:  
COUNTY OF NEW YORK    )

PAULA GELLMAN, being duly sworn, deposes and says:

1.     I am an Assistant Attorney General in the Charities Bureau of the office of Andrew M. Cuomo, Attorney General of the State of New York. The Attorney General represents the ultimate beneficiaries of gifts for charitable purposes pursuant to Article 8 of the Estates, Powers and Trusts Law ("EPTL") and is a necessary party to this proceeding under EPTL § 8-1.1(f).

2.     I submit this affidavit in connection with the Verified Petition for further cy pres relief (the "Petition") of New York City Opera, Inc. ("City Opera"), a Type B New York not-for-profit corporation located in New York, New York. By order dated October 28, 2008 (the "2008 court order"), City Opera obtained prior cy pres relief pursuant to EPTL § 8-1.1(c)(1) permitting City Opera to borrow \$17.52 million from the Wallace Endowment Fund. See Exhibit A annexed to the Supplemental Affidavit of Andrew D. Schau. As discussed in more detail in the Petition and supporting affidavits, City Opera continues to face a serious financial emergency

and seeks permission to borrow an additional \$6.6 million from the Wallace Endowment Fund in order to meet immediate cash flow obligations.

The Wallace Endowment Fund

3. The Wallace Endowment Fund is a restricted endowment fund created by the Lila Acheson and DeWitt Wallace Fund for Lincoln Center pursuant to an endowment agreement dated April 30, 2001. See Exhibit E annexed to the Supplemental Affidavit of Andrew D. Schau.

4. The Wallace Endowment Fund is subject to a number of provisions including the following: (a) the assets must be maintained in perpetuity as an endowment fund; (b) annual spending from the fund must be consistent with the spending policy applied to each of City Opera's other endowment funds, and such annual spending, referred to as the "annual contribution," may reduce the value of the fund to below its original fair market value with no obligation to restore the fund to its original fair market value; (c) City Opera may also expend in certain circumstances a portion of the fund as a "special contribution" as long as there is a matching contribution of at least twice the amount expended from the fund and the value of the fund is not reduced below 80% of the original fair market value, among other conditions; and (d) the annual and special contributions shall be used for the following priority needs: new works or new productions or new performances, or to underwrite touring of new productions or repertory, or to support educational or audience outreach programs, and once said priority needs are met may be used for other priority needs identified by City Opera. See Exhibit E annexed to the Supplemental Affidavit of Andrew D. Schau. According to the Petition, City Opera has reached the limit of permissible special contributions from the Wallace Endowment Fund and the permissible annual contributions from the Fund are insufficient to alleviate the current financial

situation. See Petition ¶ 35.

The Prior Cy Pres Relief

5. Pursuant to the 2008 court order, City Opera received permission to (a) borrow from the Wallace Endowment Fund the amount of \$9.5 million to repay an outstanding loan used to cover the cash shortfall for the 2007-2008 fiscal year and (b) borrow from the Wallace Endowment Fund up to \$8.02 million to cover the cash flow needs of its operations during the 2008-2009 fiscal year.

6. City Opera sought the initial cy pres relief because it has been experiencing an unprecedented financial emergency resulting in a severe cash flow crisis. The financial emergency arises from a number of reasons, chief among them the closure of the State Theater for renovations for the 2008/2009 season resulting in a significant loss of ticket revenues, as well as the worsening economy.

7. The Attorney General raised no objection to the prior requested relief subject to the following conditions that were incorporated into the 2008 court order:

(a) an obligation to restore to the Wallace Endowment Fund the amounts expended in connection with the requested cy pres relief, as well as a further obligation to restore the Wallace Endowment Fund to at least 80% of its historic dollar value;

(b) the development of a viable financial plan, in consultation with an independent financial advisor approved by the Attorney General, to restore City Opera's short-term and long-term financial health. The financial plan was required to include a detailed budget with reasonable good faith projections of revenues and expenses (and cash flows to the extent they can be reasonably projected), based on reasonable assumptions as to City Opera's financial condition

and general economic conditions, and a plan for repaying any amounts borrowed from the Wallace Endowment Fund or any other source, and required approved by the Board of Directors;

(c) certain spending restrictions with respect to the expenditure of any funds borrowed from the Wallace Endowment Fund for expenses related to programming scheduled to be presented subsequent to the 2008-2009 fiscal year;

(d) evaluation by the Board of Directors of the effectiveness of City Opera's governance, financial and risk management, investment practices and systems of internal controls, and adoption by the Board of appropriate enhancements thereto;

(e) the designation or retention of qualified individuals or firms to perform the roles and functions of chief executive, internal auditor and chief financial officer if such positions are or become vacant; and

(f) a requirement that any future use of restricted assets as collateral for indebtedness shall have prior court (or, where applicable, donor) approval unless otherwise permitted by the gift instrument.

8. Pursuant to the 2008 court order, City Opera borrowed \$9.479 million from the Wallace Endowment Fund to pay down the outstanding loan used to cover the cash shortfall for the 2007-2008 fiscal year and expended most of the \$8.02 million it was authorized to borrow to cover the cash flow needs of its operations during the 2008-2009 fiscal year, with the remainder expected to be expended by April 8, 2009. See Petition ¶¶ 36 and 38. As of February 28, 2009, the Wallace Endowment Fund had assets of \$12,432,447, and after City Opera draws down the remaining borrowing capacity authorized by the 2008 court order the Wallace Endowment Fund will have approximately \$9.8 million remaining. See Petition ¶ 36.

### The Current Request for Cy Pres Relief

9. At the time of the prior cy pres petition, City Opera anticipated the need to return to this court for further cy pres relief, and it now seeks permission to borrow an additional \$6.6 million from the Wallace Endowment Fund to meet its current cash flow needs. See Petition ¶¶ 4-5, 56. According to City Opera, the need for the current cy pres relief is urgent and without the requested relief it will not have adequate financial resources to meet its payroll and other obligations as of May 6, 2009. See Petition ¶ 7 and Affidavit of Emergency ¶ 2. At the time of the prior request, the Attorney General's Charities Bureau advised City Opera that our position with respect to any future request for further cy pres relief would depend on the extent to which City Opera was able to develop a viable financial plan, including the ability to repay the amounts borrowed from the Wallace Endowment Fund, and the additional steps taken to address its long term financial health, as well as the satisfaction of other conditions set forth above, including appropriate financial and governance reforms.

10. The Attorney General's Charities Bureau has closely monitored City Opera's compliance with the conditions set forth in the 2008 court order. City Opera has retained an independent financial advisor and developed a financial plan, including a plan to repay amounts borrowed from the Wallace Endowment Fund and contingency plans in the event that revenues fall short of projections. City Opera has revised its proposed programming to be presented subsequent to the 2008-2009 fiscal year to reflect more realistic budgetary criteria. City Opera has retained the law firm of Weil Gotshal & Manges LLP to assist the Board of Directors in evaluating the effectiveness of City Opera's governance, financial practices and internal controls. City Opera has hired a new General Manager and Artistic Director, has retained a firm to perform



the role of internal auditor, and is in the process of hiring a new chief financial officer. We have met with City Opera's representatives, including the independent financial advisor and City Opera's newly appointed General Manager and Artistic Director, and have carefully reviewed City Opera's financial plan and other financial data.

11. Based on the steps City Opera has taken to date, we have no objection to the requested additional cy pres relief conditioned on the following, all of which have been agreed to by City Opera and incorporated into the proposed order:

(a) a continued obligation to restore to the Wallace Endowment Fund the amounts borrowed pursuant to both the 2008 court order and the current request for further cy pres relief, as well as the continued obligation pursuant to the 2008 court order to restore the Wallace Endowment Fund to at least 80% of its historic dollar value;

(b) City Opera's senior management shall provide the Board of Directors or its Executive Committee a monthly written report concerning any variances from the budget for the 2009-2010 fiscal year and biweekly updated written cash flow projections for the balance of the 2008-2009 fiscal year and for the 2009-2010 fiscal year;

(c) City Opera shall report, for the balance of the 2008-2009 fiscal year and for the 2009-2010 fiscal year, on at least a monthly basis to the independent financial advisor concerning its strategic plan and financial plan in order to review budget variances, to obtain the independent financial advisor's assessment of the continued viability of such strategic and financial plans, and to identify alternative courses of action as warranted;

(d) City Opera's Board of Directors shall continue its on-going process of evaluating the effectiveness of its governance, financial and risk management, investment management

practices and systems of internal controls, and shall adopt appropriate enhancements thereto;

(e) City Opera shall designate or retain a qualified individual to perform the role and function of chief financial officer;

(f) City Opera shall, for the balance of the 2008-2009 fiscal year and for the 2009-2010 fiscal year, report to the Attorney General on at least a quarterly basis concerning its compliance with the terms of this order, and in addition shall report to the Attorney General on an annual basis regarding its obligation to replenish the Wallace Endowment Fund until the amounts borrowed have been fully restored.

12. The Attorney General is satisfied that the requirements of EPTL § 8-1.1(c)(1) and the doctrine of cy pres have been met, including (a) that the gift to City Opera was charitable in nature, (b) that the donor had a general, rather than specific, charitable intent, and (c) that circumstances have so changed since the creation of the Wallace Endowment Fund as to render impracticable or impossible a literal compliance with the terms of the gift, warranting the further cy pres relief requested in the Petition. Based on the exigent circumstances described in the Petition and the Affidavit of Emergency, the Charities Bureau is satisfied that, absent the cy pres relief requested here, City Opera will be at substantial risk in the near future of being unable to meet payroll and other immediate financial obligations. It appears that the further cy pres relief requested herein would significantly alleviate City Opera's current financial emergency as described in the Petition, particularly in view of the closure of the State Theater for the 2008/2009 season, and thus enable it to continue to carry out its not-for-profit purposes.

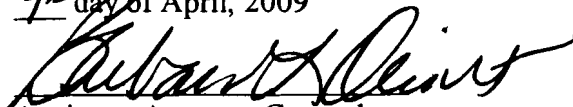
13. Accordingly, the Attorney General has no objection to the granting of the additional cy pres relief requested herein by City Opera and entry of the proposed order submitted with the Petition.



---

PAULA GELLMAN  
Assistant Attorney General  
Charities Bureau  
120 Broadway  
New York, NY 10271  
(212) 416-8404

Sworn to before me this  
9<sup>th</sup> day of April, 2009



Assistant Attorney General  
(pursuant to Exec. L. § 73)

**INDEX NO.**  
**SUPREME COURT OF THE STATE OF NEW YORK**  
**COUNTY OF NEW YORK**

In the Matter of the Application of  
NEW YORK CITY OPERA, INC.,

Petitioner,

For cy pres relief pursuant to Section 8-1.1(c) of the  
Estates, Powers and Trusts Law of the State of  
New York.

**AFFIDAVIT OF  
NO OBJECTION ON BEHALF  
OF THE ATTORNEY GENERAL**

**ANDREW M. CUOMO**  
**Attorney General of the State of**  
**New York**  
**CHARITIES BUREAU**  
**Office and P.O. Address**  
**120 Broadway, Third Floor**  
**New York, NY 10271**

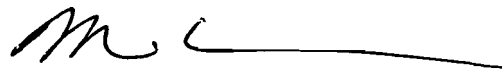
**Assistant Attorney General**  
**Paula Gellman**  
**Tel. (212) 416-8404**



communicated extensively, in person, by telephone, and by electronic mail, with Petitioner's finance staff and members of Petitioner's Board of Directors to discuss and review Petitioner's recent financial and operating history and its plans for the future. I have reviewed the budgets and cash-flow projections, including the contingency plans, that are described in the Petition and were submitted to the Attorney General in connection with the Attorney General's review of the Petition herein. I have also taken into account other factors relevant to Petitioner's financial circumstances, including general economic conditions and Petitioner's recent financial and operating history.

4. I have met with the Attorney General concerning the plan developed by Petitioner, and I have answered questions from the Attorney General about the plan and Petitioner's planning process.

5. Based on my review, and my extensive experience managing and advising cultural organizations in New York, Washington, D.C., London and other cities, and given the information presently available, including general economic conditions, I am satisfied (a) that Petitioner's budgets and cash-flow projections, including its contingency plans, are based on reasonable assumptions about, and were developed on the basis of reasonable and customary methodologies for the projection of, revenues and expenses for an organization of Petitioner's type and size and its financial and operating history and (b) that Petitioner's strategic and financial plan represents a viable plan for the future.



MICHAEL M. KAISER

Sworn to before me this

31<sup>st</sup> day of March, 2009

Paul J. Manthey  
Notary Public

Index No.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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In the Matter of the Application of  
NEW YORK CITY OPERA, INC.,

Petitioner,

For cy pres relief pursuant to Section 8-1.1(c) of the  
Estates, Powers and Trusts Law of the State of New  
York.

---

AFFIDAVIT OF MICHAEL M. KAISER

---

**Patterson Belknap Webb & Tyler LLP**  
Attorneys for Petitioner

1133 Avenue of the Americas  
New York, New York 10036-6710  
Telephone: (212) 336-2000

In the Matter of the Application of  
NEW YORK CITY OPERA, INC.

SUPPLEMENTAL AFFIDAVIT OF  
ANDREW D. SCHAU

For cy pres relief pursuant to Section 8-1.1(c) of the  
Estates, Powers and Trusts Law of the State of  
New York

)

SS.:

)

1. I am a partner in the firm of Patterson Belknap Webb & Tyler LLP, attorneys for Petitioner, the New York City Opera, Inc. I make this affidavit in support of the application by Petitioner for cy pres relief with respect to an endowment fund (the “Wallace Endowment”) that supports City Opera.

3. Annexed hereto as Exhibit B is a copy of a President's Certificate, the original of which is in my possession, certifying that on March 12, 2009, the Board adopted a resolution authorizing the submission of this Petition.



4. Annexed hereto as Exhibit C is a copy of the Certificate of Incorporation (as amended) for Lila Acheson and DeWitt Wallace Fund for Lincoln Center ("WFLC") and a copy of the Certificate of Dissolution of WFLC, which copies, on information and belief, are true and complete copies of certified copies obtained from the Secretary of State of the State of New York.

5. Annexed hereto as Exhibit D are copies of the Instruments of Grant for the funding of WFLC, which Instruments, on information and belief constitute all of the instruments pertaining to the funding of WFLC and which copies, on information and belief, are true and complete copies thereof.


6. Annexed hereto as Exhibit E is a copy of the agreement between WFLC and City Opera as of April 30, 2001 (the "Wallace Agreement"), which copy, on information and belief, is a true and complete copy of the original Wallace Agreement, which on information and belief is among the business records of City Opera

7. Annexed hereto as Exhibits F and G, respectively, are copies of the resumes of Michael M. Kaiser and George Steel, which copies, on information and belief, are true and complete copies thereof.

8. Annexed hereto as Exhibits H and I, respectively, are true and complete copies of this Court's opinions in *Matter of Wolseley*, 814 N.Y.S.2d 893, 2005 WL 3726198 (Sur. Ct. Suff. County 2005) and *Matter of St. Charles Hospital*, N.Y.L.J., Aug. 4, 1995, at 25, col. 6 (Sur. Ct. Suff. County 1995), unreported cases in which this Court granted cy pres relief to other New York City nonprofit institutions in financial distress.

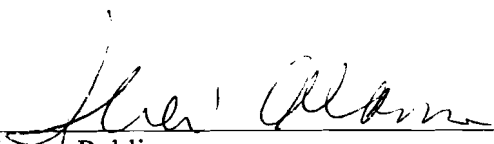
9. In connection with our preparation of the Petitioner's case, I caused a search to be made of the files of this Court in a case called *Matter of The Cooper Union for the*

*Advancement of Science and Art*, Sup. Ct., N.Y. County, Index No. 112519/06 (2006), where this Court granted cy pres relief to another New York City nonprofit institution that was under severe financial pressure. The significance of the *Cooper Union* case is discussed at page 17 of the Memorandum of Law submitted herewith. Attached for the convenience of this Court as Exhibits J and K to my affidavit are true and complete copies of the Petition and the unreported Order in *Cooper Union*, dated September 27, 2006.

  
ANDREW D. SCHAU

Sworn to before me this

9<sup>th</sup> day of April, 2009

  
Notary Public

**ILIA ALAMO**  
Notary Public, State of New York  
No. 01AL6157268  
Qualified in Bronx County  
Commission Expires December 04, 2010

Exhibit A



WHEREAS, there are no persons interested in this proceeding other than Petitioner and the Attorney General, IT IS HEREBY

ORDERED that Petitioner is entitled to cy pres relief pursuant to Section 8-1.1(c) of the New York Estates, Powers and Trusts Law with respect to its petition regarding the endowment fund held pursuant to an Agreement effective as of April 30, 2001 by and among the Lila Acheson and DeWitt Wallace Fund for Lincoln Center and City Opera, City Ballet, the Met, the Chamber Music Society of Lincoln Center, Inc., the Vivian Beaumont Theater, Inc., and the Philharmonic-Symphony Society of New York, Inc (such fund hereinafter, the "Wallace Fund"), as follows:

(a) Petitioner may borrow from the Wallace Fund (in addition to those amounts which Petitioner may expend pursuant to the terms of the Wallace Agreement and applicable law) the amount of \$9,500,000 to pay down the indebtedness associated with Petitioner's 2007-2008 cash shortfall.

(b) Petitioner may borrow from the Wallace Fund (in addition to those amounts which Petitioner may expend pursuant to the terms of the Wallace Agreement and applicable law) up to \$8,020,000 during its 2008-2009 fiscal year in order to fund its cash-flow needs during the 2008-2009 fiscal year, except that in the case of each payment made to a vendor or other third party subsequent to the date of this Order with respect to any expense related to programming scheduled to be presented by Petitioner subsequent to the 2008-2009 fiscal year, such payment may be made with funds borrowed from the Wallace Fund only if such payment (i) is required to be made pursuant to a contractual commitment entered into on or before the date of this Order, (ii) is required to be made pursuant to a contractual commitment entered into subsequent to the date of this Order which contractual commitment is approved by the Executive

Committee of Petitioner's Board of Directors (the "Executive Committee") or the Board of Directors, as recorded in the minutes of such body or in a resolution by unanimous written consent, (iii) is made on prior written approval of the Executive Committee or the Board of Directors, as recorded in the minutes of such body or in a resolution by unanimous written consent, or (iv) is \$25,000 or less and is made on prior written approval of Petitioner's Executive Director or other officer designated by the Executive Committee or the Board of Directors for this purpose, following such officer's consultation with at least three members of the Executive Committee.

(c) Petitioner shall (i) restore to the Wallace Fund the net amounts borrowed from it pursuant to paragraphs (a) and (b) as Petitioner has net financial resources that may be prudently used for that purpose consistent with the legal restrictions on the use of such resources and (ii) restore the Wallace Fund to at least eighty percent of its historic dollar value as Petitioner has net financial resources that may be prudently used for that purpose consistent with the legal restrictions on the use of such resources and as there is net appreciation within the Wallace Fund.

(d) Petitioner, in consultation with an independent financial advisor, shall develop a viable financial plan, by December 15, 2008, or such later date as the Attorney General and Petitioner shall agree, to restore Petitioner's short-term and long-term financial health. The independent financial advisor retained for such purpose shall be subject to the approval of the Attorney General (such approval not to be unreasonably withheld). The financial plan shall include a detailed budget with reasonable good faith projections of revenues and expenses (and cash flows to the extent they can be reasonably projected), based on reasonable assumptions as to Petitioner's financial condition and general economic conditions. The

financial plan shall also include a plan for repaying any amounts borrowed from the Wallace Fund or any other source. Such plan shall be approved by the Board of Directors.

(e) Petitioner's Board of Directors shall evaluate the effectiveness of Petitioner's governance, financial and risk management, investment management policies and practices, and systems of internal controls and, following consultation with the Attorney General, shall adopt appropriate enhancements thereto.

(f) Petitioner shall designate or retain qualified individuals or firms to perform the roles and functions of chief executive, internal auditor and chief financial officer insofar as such positions are or become vacant.

(g) Petitioner shall use restricted assets as collateral for indebtedness only with prior court approval or prior written approval of the donor, unless such use is permitted by law and under the terms of the applicable restrictions as determined following review and approval by Petitioner's Finance Committee and Executive Committee, or its Board of Directors, as recorded in the minutes of their deliberations.

Dated: October 28 2008

Part 501

ENTER:

J.S.C.

HON. JAMES A. YATES

Exhibit B

09340000028



### President's Certification

IN WITNESS WHEREOF, I have hereunto set my hand as President of the Corporation and caused the corporate seal to be affixed thereto this 30<sup>th</sup> day of March, 2009.

30<sup>th</sup> day of March, 2009.

KATHLEEN  
NOTASTY  
Comm.

# ***STATE OF NEW YORK***

## ***DEPARTMENT OF STATE***

I hereby certify that the annexed copy has been compared with the original document in the custody of the Secretary of State and that the same is a true copy of said original.



WITNESS my hand and official seal of the  
Department of State, at the City of Albany, on  
March 3, 2008.

A handwritten signature in cursive script that reads "Paul LaPointe".

Paul LaPointe  
Special Deputy Secretary of State

CERTIFICATE OF INCORPORATION

OF THE

LILA ACHESON AND

DEWITT WALLACE FUND

FOR

LINCOLN CENTER

Under Section 402 of the Not-For-Profit  
Corporation Law of the State of New York

I, the undersigned, a natural person of at least  
eighteen years, for the purpose of forming a not-for-profit  
corporation under Section 402 of the Not-For-Profit Corpora-  
tion Law of the State of New York, HEREBY CERTIFY as follows:

FIRST: The name of the Corporation is LILA  
ACHESON AND DEWITT WALLACE FUND FOR LINCOLN CENTER

SECOND: The Corporation is a corporation as  
defined in sub-paragraph (a)(5) of Section 102 (definitions)  
of the Not-For-Profit Corporation Law and is a "Type B"  
corporation as defined in paragraph (b) of Section 201 of  
said Law.

THIRD: The Corporation is formed exclusively  
for scientific, literary, charitable and educational purposes  
by operating exclusively for the benefit of the constituent

companies of Lincoln Center for the Performing Arts, Inc. of New York, New York and in particular for the support of the Metropolitan Opera Association, Inc., the New York City Ballet, Inc., the New York City Opera, Inc., the Philharmonic-Symphony Society of New York, Inc., The Vivian Beaumont Theater, Inc., and the Chamber Music Society of Lincoln Center, Inc. in such a manner that the Corporation will be an organization described in section 509(a)(3) of the Internal Revenue Code of 1954, as amended and supplemented (the "Code") (or the corresponding provision of any future United States internal revenue law), and to that end the Corporation shall have power to solicit grants and contributions, and to acquire by bequest, grant, gift, devise, purchase, lease or otherwise any property, real or personal, tangible or intangible, or any undivided interest therein, without limitation as to amount or value, and to own, hold, use, manage, sell, deal with, lease, pledge, mortgage, donate and dispose of the same, and to invest, reinvest and deal with the principal and income thereof, and in general to do any and all acts and things and to exercise any and all powers, including, without limitation, those general powers enumerated in Section 202(a) of the Not-For-Profit Corporation Law, which may now or hereafter be lawful for the Corporation to do or exercise under or pursuant to the laws of the State of New York for the purpose of accomplishing any of the purposes of the Corporation, all in such manner as, in the judgment of

the directors of the Corporation, shall best promote the purposes of the Corporation, without limitation, except such limitations, if any, as may be contained in the instrument under which any such property is received, or in this Certificate of Incorporation, the by-laws of the Corporation or any applicable laws; provided, however, that notwithstanding any other provision of this Certificate of Incorporation, the Corporation shall not carry on any activities which are not permitted to be carried on by (1) a corporation exempt from Federal income tax under section 501(c)(3) of the Code (or any corresponding provisions of any future United States internal revenue law) or (2) a corporation, contributions to which are deductible under section 170(c)(2) of the Code (or the corresponding provision of any future United States internal revenue law), and provided, further, that nothing herein shall authorize the Corporation, directly or indirectly, to engage in or include among its purposes any of the activities mentioned in Section 404(b)-(t) of the Not-For-Profit Corporation Law.

The Corporation has not been formed for profit or pecuniary advantage and no part of the assets, income or profit of the Corporation is distributable to, or shall inure to the benefit of, any member, trustee, director, officer or employee of the Corporation, or any private individual, except that reasonable compensation may be paid

for services rendered to or for the Corporation in effecting one or more of its purposes, and no member, trustee, director, officer or employee of the Corporation, or any private individual, shall be entitled to share in the distribution of any of the corporate assets or dissolution of the Corporation.

FOURTH: The territory in which the activities of the Corporation are principally to be conducted is the City of New York, County of New York, State of New York, but the activities of the Corporation shall not be restricted to such territory.

FIFTH: The principal office of the Corporation is to be located in the City of New York, County of New York, State of New York.

SIXTH: The names and places of residence of the initial directors of the Corporation are:

<u>Names</u>	<u>Addresses</u>
John A. O'Hara	188 Stanwich Road Greenwich, CT 06830
Anthony A. Bliss	One Lincoln Plaza New York, NY 10025
Barnabas McHenry	164 E. 72nd Street New York, NY 10021

SEVENTH: The Secretary of State, pursuant to Chapter 564 of the N.Y.S. Laws of 1981 §402 (a) (7), is hereby designated as agent of the corporation upon whom process against it may be served. The post office address to which the Secretary shall mail a copy of any process

against the Corporation served upon him is 34th Floor,  
200 Park Avenue, New York, NY 10166.

EIGHTH: Prior to delivery of this Certificate of Incorporation to the Department of State for filing, all such approvals or consents required by law shall be endorsed upon or annexed to this certificate.

NINTH: As specified by the following Sections of the Code, or by cognate provisions of law, the Corporation, in the event that and so long as it is a "private foundation" within the meaning of section 509(a) of the Code (or the corresponding provision of any future United States internal revenue law), shall distribute its income for each taxable year at such time and in such manner as not to subject it to tax under section 4942 of the Code, and the Corporation shall not (1) engage in any act of self-dealing as defined in section 4941(d) of the Code, (2) retain any excess business holdings as defined in section 4943(c) of the Code, (3) make any investment in such manner as to subject the corporation to tax under section 4944 of the Code or (4) make any taxable expenditures as defined in section 4945(d) of the Code.

TENTH: Upon the dissolution of the Corporation the directors of the Corporation shall, after paying or making provision for the payment of all the liabilities of

the Corporation, dispose of all of the assets and property of the Corporation to or for the use of the constituent companies of Lincoln Center and in particular the Metropolitan Opera Association, Inc., the New York City Ballet, Inc., the New York City Opera, Inc., the Philharmonic-Symphony Society of New York, Inc., The Vivian Beaumont Theater, Inc., and the Chamber Music Society of Lincoln Center, Inc. or such successor organization or organizations organized and operated exclusively for scientific, literary, charitable or educational purposes, as may, consistent with the Corporation's qualification under section 509(a)(3) of the Code (or the corresponding provision of any future United States internal revenue law), be designated in any amendment to this Certificate of Incorporation, subject to an order of a Justice of the Supreme Court of the State of New York.

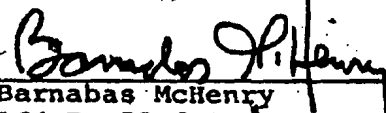
ELEVENTH: No substantial part of the activities of the Corporation shall consist of carrying on propaganda, or otherwise attempting to influence legislation, and the Corporation shall not participate in, or intervene in (including the publishing or distributing of statements) any political campaign on behalf of any candidate for public office.

TWELFTH: This certificate is not for an existing unincorporated association or group.



THIRTEENTH: Nothing in this Certificate of Incorporation shall limit the authority of the members to alter or amend this Certificate of Incorporation, provided that no such alteration or amendment may be effected unless two-thirds or more of the members of the Corporation shall vote therefor and provided further that such amendment or alteration shall be consistent with the Corporation's qualification as an organization described in section 509(a)(3) of the Code (or the corresponding provision of any future United States internal revenue law).

IN WITNESS WHEREOF, I have made, subscribed and acknowledged this certificate this 7 day of December, nineteen hundred and eighty-one.

  
Barnabas McHenry  
164 E. 72nd Street  
New York, NY 10021

STATE OF NEW YORK     )  
                              : ss.:  
COUNTY OF NEW YORK    )

On this 2<sup>nd</sup> day of December, 1981, before me  
personally came Barnabas McHenry, to me known and known to  
me to be the person mentioned and described in and who  
executed the foregoing Certificate of Incorporation and he  
duly acknowledged to me that he executed the same.

Claire M. Zannoni  
Notary Public

CLAIRE M. ZANNONI  
Notary Public, State of New York  
No. 31-4782204  
Qualified in New York County  
Cert. filed in Westchester County  
Commission Expires March 30, 1983

8

November 30, 1981

Secretary of State  
State of New York  
Albany, New York

Re: Incorporation of Lila Acheson and DeWitt  
Wallace Fund for Lincoln Center

Dear Sirs:

Lila Acheson Wallace hereby consents to the  
formation of the above-referenced corporation and has no  
objection to the use of the name "Lila Acheson Wallace"  
by such corporation.

Very truly yours,

*Lila Acheson Wallace*  
Lila Acheson Wallace

9

09340000039

DEWITT WALLACE FUND, INC.

A NEW YORK MEMBERSHIP CORPORATION

November 30, 1981

Secretary of State  
State of New York  
Albany, New York

Re: Incorporation of Lila Acheson Wallace and  
DeWitt Wallace Fund for Lincoln Center

Dear Sirs:

DeWitt Wallace Fund, Inc. hereby consents to the  
formation of the above-referenced corporation and has no  
objection to the use of the name "DeWitt Wallace Fund" by  
such corporation.

Very truly yours,

DEWITT WALLACE FUND, INC.

By

Barnabas McHenry  
Barnabas McHenry, Secretary

10

09340000040

SUPREME COURT ; NEW YORK COUNTY

In the Matter

of

The application for approval of the  
Certificate of Incorporation of the

APPROVAL

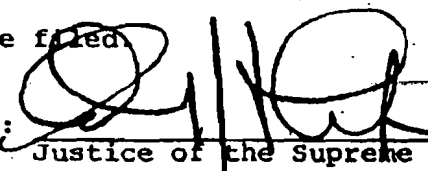
LILA ACHESON AND  
DEWITT WALLACE FUND  
FOR LINCOLN CENTER

pursuant to the Not-For-Profit  
Corporation Law

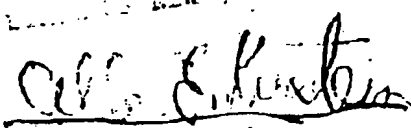
I, **EDWARD H. LEHNER**

, a Justice of  
the Supreme Court of the State of New York in the First  
Judicial District wherein the principal office of the LILA  
ACHESON AND DEWITT WALLACE FUND FOR LINCOLN CENTER is to be  
located, do hereby approve the within Certificate of Incorpora-  
tion of the LILA ACHESON AND DEWITT WALLACE FUND FOR LINCOLN  
CENTER and consent that the same be filed.

Dated: **JAN 8 1982**  
New York, New York

Signed:   
Justice of the Supreme Court

**EDWARD H. LEHNER**

RECEIVED  
CLERK OF THE SUPREME COURT  
NEW YORK  
  
December 24, 1981  
ASSISTANT CLERK  
General

4835822

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

SPECIAL TERM

PART II

CERTIFICATE OF INCORPORATION

of the

LILA-ACHESON <sup>AND</sup> DEWITT WALLACE FUND

FOR

LINCOLN CENTER

STATE OF NEW YORK DAY & LORD.  
DEPARTMENT OF STATE ATTORNEYS FOR  
Corporation

FILED JAN 26 1982

2-  
AMT. OF CHECK \$ 26  
FILING FEE \$ 50  
TAX \$  
COUNTY FEE \$  
COPY \$ 16  
CERT \$  
REFUND \$  
SPEC HANDLE \$ 10

25 BROADWAY  
NEW YORK, N.Y. 10004

BY: *[Signature]*

AREA CODE 212 344-8480

JAN 27 1982

FILED

***STATE OF NEW YORK***  
***DEPARTMENT OF STATE***

I hereby certify that the annexed copy has been compared with the original document in the custody of the Secretary of State and that the same is a true copy of said original.



WITNESS my hand and official seal of the  
Department of State, at the City of Albany, on  
March 3, 2008.

A handwritten signature in cursive script that reads "Paul LaPointe".

Paul LaPointe  
Special Deputy Secretary of State

6219364

CERTIFICATE OF AMENDMENT

OF THE

LILA ACHESON AND DEWITT WALLACE FUND

FOR

LINCOLN CENTER

under Section 803 of the Not-For-Profit  
Corporation Law

WE, THE UNDERSIGNED, George V. Grune being the  
President, and Barnabas McHenry being the Secretary of  
the Lila Acheson and Dewitt Wallace Fund for Lincoln  
Center, do hereby certify:

1. The name of the corporation is Lila  
Acheson and Dewitt Wallace Fund for Lincoln Center (the  
"Corporation").

2. The Certificate of Incorporation of the  
Corporation was filed by the Department of State on the  
26th day of January, 1982. The Corporation was formed  
under the Not-For-Profit Corporation Law of the State of  
New York.

3. The Corporation is a corporation as  
defined in subparagraph (a)(5) of section 102 of the  
Not-For-Profit Corporation Law; it is a Type B



corporation under section 201 of said law, and it will be a Type B corporation following this amendment.

4. To delete the Vivian Beaumont Theater, Inc., a constituent company of Lincoln Center for the Performing Arts, Inc., as an organization with respect to which the Corporation is particularly to operate, paragraph THIRD of the Certificate of Incorporation of the Corporation is amended to read as follows, effective as of the date this Certificate is filed by the

Secretary of State:

"THIRD: The Corporation is formed exclusively for scientific, literary, charitable and educational purposes by operating exclusively for the benefit of the constituent companies of Lincoln Center for the Performing Arts, Inc. of New York, New York and in particular for the support of the Metropolitan Opera Association, Inc., the New York City Ballet, Inc., the New York City Opera, Inc., the Philharmonic-Symphony Society of New York, Inc., and the Chamber Music Society of Lincoln Center, Inc. in such a manner that the Corporation will be an organization described in section 509(a)(3) of the Internal Revenue Code of 1954, as amended and supplemented (the "Code") (or the corresponding provision of any future United States internal revenue law), and to that and the

Corporation shall have power to solicit grants and contributions, and to acquire by bequest, grant, gift, devise, purchase, lease or otherwise any property, real or personal, tangible or intangible, or any undivided interest therein, without limitation as to amount or value, and to own, hold, use, manage, sell, deal with, lease, pledge, mortgage, donate and dispose of the same, and to invest, reinvest and deal with the principal and income thereof, and in general to do any and all acts and things and to exercise any and all powers, including, without limitation, those general powers enumerated in Section 202(a) of the Not-For-Profit Corporation Law, which may now or hereafter be lawful for the Corporation to do or exercise under or pursuant to the laws of the State of New York for the purpose of accomplishing any of the purposes of the Corporation, all in such manner as, in the judgment of the directors of the Corporation, shall best promote the purposes of the Corporation, without limitation, except such limitations, if any, as may be contained in the instrument under which any such property is received, or in this Certificate of Incorporation, the by-laws of the Corporation or any applicable laws; provided, however, that notwithstanding any

other provision of this Certificate of Incorporation, the Corporation shall not carry on any activities which are not permitted to be carried on by (1) a corporation exempt from Federal income tax under section 501(c)(3) of the Code (or any corresponding provisions of any future United States internal revenue law) or (2) a corporation, contributions to which are deductible under section 170(c)(2) of the Code (or the corresponding provision of any future United States internal revenue law), and provided, further, that nothing herein shall authorize the Corporation, directly or indirectly, to engage in or include among its purposes any of the activities mentioned in Section 404(b)-(t) of the Not-For-Profit Corporation Law.

The Corporation has not been formed for profit or pecuniary advantage and no part of the assets, income or profit of the Corporation is distributable to, or shall inure to the benefit of, any member, trustee, director, officer or employee of the Corporation, or any private individual, except that reasonable compensation may be paid for services rendered to or for the Corporation in effecting one or more of its purposes, and no member, trustee, director, officer or employee of the Corporation, or any private individual, shall


be entitled to share in the distribution of any of the corporate assets or dissolution of the Corporation."

5. The manner in which this amendment was authorized was by the unanimous vote of all of the members of the Corporation at a special meeting pursuant to Article III, Section 4, and Article XIV of the By-Laws of the Corporation.

6. The Secretary of State, is hereby designated as agent of the Corporation upon which process against it may be served. The post office address to which the Secretary shall mail a copy of any process against the Corporation served upon him is 34th Floor, 200 Park Avenue, New York, New York 10166.

IN WITNESS WHEREOF, the undersigned have executed and signed this certificate on the dates indicated opposite their respective signatures.

2/28/85  
Date

  
George V. Grune  
President

2/20/85  
Date

  
Barnabas Mokony  
Secretary

STATE OF NEW YORK )

SS.:

COUNTY OF NEW YORK)

I, George V. Grune, being duly sworn, deposes and says that I am the President of Lila Acheson and DeWitt Wallace Fund for Lincoln Center, and one of the persons who signed the foregoing Certificate of Amendment, that I have read the Certificate of Amendment and know the contents thereof and that the same is true to my own knowledge.

*George V. Grune*  
George V. Grune

Sworn to before me this  
28 day of February, 1985.

*Josephine Brucculeri*  
Notary Public

My commission expires:


JOSEPHINE BRUCCULERI  
Notary Public, State of New York  
No. 80-4647379  
Qualified in Westchester County  
Certificate Filed in New York County  
Commission Expires March 30, 1986

STATE OF NEW YORK )•

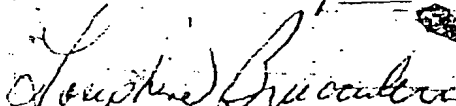
SS.:

COUNTY OF NEW YORK)

I, Barnabas McHenry, being duly sworn, deposes and says that I am the Secretary of Lila Acheson and Witt Wallace Fund for Lincoln Center, and one of the persons who signed the foregoing Certificate of Amendment, that I have read the Certificate of Amendment and know the contents thereof and that the same is true to my own knowledge.

  
Barnabas McHenry

Sworn to before me this  
27 day of February 1985.

  
Notary Public

My commission expires:

JOSEPHINE BRUCCULIERI  
Notary Public, State of New York  
No. 60-4847379  
Qualified in Westchester County  
Certificate Filed in New York County  
Commission Expires March 30, 1986

STATE OF NEW YORK )

SS.:

COUNTY OF NEW YORK )

J. EDWARD SHILLINGBURG, being duly sworn,  
deposes and says that he is an attorney and a member of  
the firm of Lord, Day & Lord, attorneys for the  
subscribers to the annexed Certificate of Amendment of  
the Certificate of Incorporation of Lila Acheson and  
Dewitt Wallace Fund for Lincoln Center and that no  
previous application for the approval of the said  
Certificate of Amendment by any Justice of the Supreme  
Court has ever been made.

*J. Edward Shillingburg*  
J. Edward Shillingburg

Sworn to before me this  
30 day of March, 1985.

*Janet LaFey*  
Notary Public

JANET LAFFEY  
Notary Public, State of New York  
# 14-2230725  
Qualified in Kings County  
Certificate filed in New York County  
Commission Expires March 30, 1985

My commission expires:

The undersigned has no objection to the  
granting of judicial approval hereof and waiving  
statutory notice.

Dated: March 22, 1985.

THE UNDERSIGNED HAS NO OBJECTION  
TO THE GRANTING OF JUDICIAL  
APPROVAL HEREIN AND WAIVES  
STATUTORY NOTICE.

ROBERT ABRAMS, ATTORNEY GEN.  
STATE OF NEW YORK

Robert Abrams  
Attorney General  
State of New York

By: Howard Hunt HOWARD HUNT  
Associate Attorney

**STANLEY PARNESS**

I, a Justice of the  
Supreme Court of the State of New York for the First  
Judicial District, hereby approve the foregoing  
Certificate of Amendment to the Certificate of  
Incorporation of Lila Acheson and Devitt Wallace Fund  
for Lincoln Center, and consent that the same be filed.

Justice of the Supreme  
Court of the State of  
New York

Dated: APRIL 3, 1985

NEW YORK COUNTY

**STANLEY PARNESS**



SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

SPECIAL TERM  
PART II

CERTIFICATE OF AMENDMENT  
of the  
ELIA ACHESON AND DEWITT WALLACE FUND  
FOR  
LINCOLN CENTER

STATE OF NEW YORK  
DEPARTMENT OF STATE

FILED APR 25 1985

AMT. OF CHECK \$ 37  
FILING FEE \$ 30  
CLERK \$  
COUNTY FEE \$  
COPY \$ 7  
CERT \$  
RECORD \$  
SERIAL \$

LORD, DAY & LORD,  
ATTORNEYS FOR

25 BROADWAY  
NEW YORK, N.Y. 10004

AREA CODE 212-344-7485

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*Super B*

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34 E. FI.

200 Park Ave

NY, NY 10022

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*WJS*

8218364

***STATE OF NEW YORK***  
***DEPARTMENT OF STATE***

I hereby certify that the annexed copy has been compared with the original document in the custody of the Secretary of State and that the same is a true copy of said original.



WITNESS my hand and official seal of the  
Department of State, at the City of Albany, on  
March 3, 2008.

*Paul LaPointe*

Paul LaPointe  
Special Deputy Secretary of State

CERTIFICATE OF AMENDMENT

OF THE

LILA ACHESON AND DEWITT WALLACE FUND

FOR

LINCOLN CENTER

under Section 803 of the Not-For-Profit  
Corporation Law

WE, THE UNDERSIGNED, George V. Grune being the  
~~President,~~ and M. Christine DeVita being the Secretary of the  
Lila Acheson and Dewitt Wallace Fund for Lincoln Center, do  
hereby certify:

1. The name of the corporation is Lila Acheson  
and Dewitt Wallace Fund for Lincoln Center (the "Corporation").
2. The Certificate of Incorporation of the Corporation  
was filed by the Department of State on the 26th day of January,  
1982. The Corporation was formed under the Not-For-Profit  
Corporation Law of the State of New York.
3. The Corporation is a corporation as defined in  
subparagraph (a)(5) of section 102 of the Not-For-Profit  
Corporation Law; it is a Type B corporation under section  
201 of said law; and it will be a Type B corporation following  
this amendment.

4. To reinstate the Vivian Beaumont Theater, Inc., a constituent company of Lincoln Center for the Performing Arts, Inc., as an organization with respect to which the Corporation is particularly to operate, paragraph THIRD of the Certificate of Incorporation of the Corporation is amended to read as follows, effective as of the date this Certificate is filed by the Secretary of State:

"THIRD: The Corporation is formed exclusively for scientific, literary, charitable and educational purposes by operating exclusively for the benefit of the constituent companies of Lincoln Center for the Performing Arts, Inc. of New York, New York and in particular for the support of the Metropolitan Opera Association, Inc., the New York City Ballet, Inc., the New York City Opera, Inc., the Philharmonic-Symphony Society of New York, Inc., the Vivian Beaumont Theater, Inc., and the Chamber Music Society of Lincoln Center, Inc. in such a manner that the Corporation will be an organization described in section 509(a)(3) of the Internal Revenue Code of 1954, as amended and supplemented (the "Code") (or the corresponding provision of any future United States internal revenue law), and to that end the Corporation shall have power to solicit grants and contributions, and to acquire by bequest, grant,

gift, devise, purchase, lease or otherwise any property, real or personal, tangible or intangible, or any undivided interest therein, without limitation as to amount or value, and to own, hold, use, manage, sell, deal with, lease, pledge, mortgage, donate and dispose of the same, and to invest, reinvest and deal with the principal and income thereof, and in general to do any and all acts and things and to exercise any and all powers, including, without limitation, those general powers enumerated in Section 202(a) of the Not-For-Profit Corporation Law, which may now or hereafter be lawful for the Corporation to do or exercise under or pursuant to the laws of the State of New York for the purpose of accomplishing any of the purposes of the Corporation, all in such manner as, in the judgment of the directors of the Corporation, shall best promote the purposes of the Corporation, without limitation, except such limitations, if any, as may be contained in the instrument under which any such property is received, or in this Certificate of Incorporation, the by-laws of the Corporation or any applicable laws; provided, however, that notwithstanding any other provision of this Certificate of Incorporation, the Corporation shall not carry on any activities which are not permitted to be carried on by (1) a

corporation exempt from Federal income tax<sup>o</sup> under section 501(c)(3) of the Code (or any corresponding provisions of any future United States internal revenue law) or (2) a corporation, contributions to which are deductible under section 170(c)(2) of the Code (or the corresponding provision of any future United States internal revenue law), and provided, further, that nothing herein shall authorize the Corporation, directly or indirectly, to engage in or include among its purposes any of the activities mentioned in Section 404(b)-(u) of the Not-For-Profit Corporation Law.

The Corporation has not been formed for profit or pecuniary advantage and no part of the assets, income or profit of the Corporation is distributable to, or shall inure to the benefit of, any member, trustee, director, officer or employee of the Corporation, or any private individual, except that reasonable compensation may be paid for services rendered to or for the Corporation in effecting one or more of its purposes, and no member, trustee, director, officer or employee of the Corporation, or any private individual, shall be entitled to share in the distribution of any of the corporate assets or dissolution of the Corporation."

5. The manner in which this amendment was<sup>d</sup> authorized was by the unanimous vote of all of the members of the Corporation at a special meeting held on December 9, 1987 pursuant to Article III, Section 4, and Article XIV of the By-Laws of the Corporation.

6. The Secretary of State, is hereby designated as agent of the Corporation upon which process against it may be served. The post office address to which the Secretary shall mail a copy of any process against the Corporation served upon him is 1270 Avenue of the Americas, Suite 2118, New York, N.Y. 10020.

IN WITNESS WHEREOF, the undersigned have executed and signed this certificate on the dates indicated opposite their respective signatures.

1/26/88  
Date

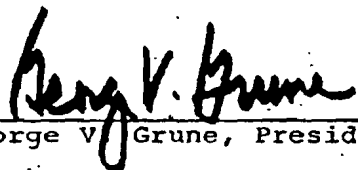
George V. Grune  
George V. Grune  
President

1/22/88  
Date

M. Christine DeVita  
M. Christine DeVita  
Secretary

STATE OF NEW YORK     )  
                                      : SS.:  
COUNTY OF NEW YORK    )

I, George V. Grune, being duly sworn, deposes and says that I am the President of Lila Acheson and Dewitt Wallace Fund for Lincoln Center, and one of the persons who signed the foregoing Certificate of Amendment, that I have read the Certificate of Amendment and know the contents thereof and that the same is true to my own knowledge.

  
George V. Grune, President

Sworn to before me this  
26<sup>th</sup> day of January, 1988.

  
Notary Public

My commission expires:

BARBARA THOMAS  
Notary Public, State of New York  
No. 258303  
Qualified in Dutchess County  
Commissioned in New York County  
Commissioned in Westchester County  
Term Expires Sept. 30, 1988



STATE OF NEW YORK     )  
                                      : SS.:  
COUNTY OF NEW YORK    )

I, M. Christine DeVita, being duly sworn, deposes and says that I am the Secretary of Lila Acheson and DeWitt Wallace Fund for Lincoln Center, and one of the persons who signed the foregoing Certificate of Amendment, that I have read the Certificate of Amendment and know the contents thereof and that the same is true to my own knowledge.

M. Christine DeVita  
M. Christine DeVita, Secretary

Sworn to before me this  
22<sup>nd</sup> day of January, 1988.

Claire M. Zannoni  
Notary Public

My commission expires:

CLAIRE M. ZANNONI  
Notary Public, State of New York  
No. 31-4703294

Qualified in New York County  
Cert. filed in Westchester County  
Commission Expires 12/31/89

The undersigned has no objection to the granting  
of judicial approval hereof and waiving statutory notice.

Dated: \_\_\_\_\_, 1988.

Robert Abrams  
Attorney General  
State of New York

By: \_\_\_\_\_

EDITH MILLER

I, \_\_\_\_\_, a Justice of  
the Supreme Court of the State of New York for the First  
Judicial District, hereby approve the foregoing Certificate  
of Amendment to the Certificate of Incorporation of Lila  
Acheson and Dewitt Wallace Fund for Lincoln Center, and  
consent that the same be filed.

*Edith Miller*  
Justice of the Supreme Court  
of the State of New York  
NEW YORK COUNTY

Dated: FEBRUARY 26, 1988

EDITH MILLER

2/23/88  
THE UNDERSIGNED HAS NO OBJECTION  
TO THE GRANTING OF JUDICIAL  
APPROVAL HEREON AND WAIVES  
STATUTORY NOTICE.

ROBERT ABRAMS, ATTORNEY GEN.  
STATE OF NEW YORK

By *Robert R. Molic*  
ROBERT R. MOLIC  
Assistant Attorney General

613458

13458

RH

BILLED

CERTIFICATE OF AMENDMENT  
 TO  
 CERTIFICATE OF INCORPORATION  
 OF THE LILA ACHESON  
 AND DEWITT WALLACE  
 FUND FOR  
 LINCOLN CENTER  
 UNDER  
 SECTION 803 OF THE  
 NOT-FOR-PROFIT  
 CORPORATION LAW

PROSKAUER ROSE GOETZ & MENDELSON  
 COUNSELLORS AT LAW  
 300 PARK AVENUE  
 BOROUGH OF MANHATTAN,  
 NEW YORK CITY 10022

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STATE OF NEW YORK  
DEPARTMENT OF STATE

FILED MAR 11 1988

AMOUNT OF CHECK \$ 50  
 FILING FEE \$ 30  
 TAX \$         
 COUNTY FEE \$         
 COPY \$ 12  
 POST \$         
 RETURN \$         
 SEC. HANDLE \$ 12

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 New York City 10022

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***STATE OF NEW YORK***

***DEPARTMENT OF STATE***

I hereby certify that the annexed copy has been compared with the original document in the custody of the Secretary of State and that the same is a true copy of said original.



WITNESS my hand and official seal of the  
Department of State, at the City of Albany, on  
March 3, 2008.

*Paul LaPointe*

Paul LaPointe  
Special Deputy Secretary of State

011218000639

CERTIFICATE OF DISSOLUTION  
OF

Lila Acheson and DeWitt Wallace Fund for Lincoln Center

UNDER SECTION 1003 OF THE NOT-FOR-PROFIT  
CORPORATION LAW

The undersigned being the Treasurer of Lila Acheson and DeWitt Wallace Fund for  
Lincoln Center, hereby certifies:

(1) The name of the corporation is Lila Acheson and DeWitt Wallace Fund for Lincoln  
Center.

(2) The certificate of incorporation of Lila Acheson and DeWitt Wallace Fund for  
Lincoln Center was filed by the Department of State on the 26<sup>th</sup> day of January 1982.

(3) The names and addresses of each of the officers and directors are as follows:

RECEIVED  
DEPARTMENT OF  
TAXATION AND FINANCE  
OCT 23 2001  
CORPORATION

Name	Directors	Address
George V. Grune		Wallace-Reader's Digest Funds Two Park Avenue, 23 <sup>rd</sup> Floor New York, NY 10016
Laraine S. Rothenberg		Fried, Frank, Harris, Shriver & Jacobson One New York Plaza, 29 <sup>th</sup> Floor New York, NY 10004
Bruce Crawford		Omnicon Group, Inc. 437 Madison Avenue, 9 <sup>th</sup> Floor New York, NY 10022
Eugene P. Grisanti		1270 Avenue of the Americas Suite 2111 New York, NY 10020
Gillian Attfield		79 E. 79 <sup>th</sup> Street New York, NY 10021

Name and Title	Officers	Address
George V. Grune President		Wallace-Reader's Digest Funds Two Park Avenue, 23 <sup>rd</sup> Floor New York, NY 10016
Bruce Crawford Vice President		Omnicon Group, Inc. 437 Madison Avenue, 9 <sup>th</sup> Floor New York, NY 10022
M. Christine DeVita Secretary		Wallace-Reader's Digest Funds Two Park Avenue, 23 <sup>rd</sup> Floor New York, NY 10016

Rob D. Nagel  
Treasurer and Director of  
Investments.

Mary E. Geras  
Assistant Treasurer and  
Director of Finance

Wallace-Reader's Digest Funds  
Two Park Avenue, 23<sup>rd</sup> Floor  
New York, NY 10016

Wallace-Reader's Digest Funds  
Two Park Avenue, 23<sup>rd</sup> Floor  
New York, NY 10016

(4) At the time of dissolution, Lila Acheson and DeWitt Wallace Fund for Lincoln Center is a Type B Corporation.

(5) Lila Acheson and DeWitt Wallace Fund for Lincoln Center holds assets that are legally required to be used for a particular purpose. Its assets are required to be used to benefit the constituent companies of Lincoln Center for the Performing Arts, Inc., in particular: the Metropolitan Opera Association, Inc., the New York City Ballet, Inc., the New York City Opera, Inc., the Philharmonic-Symphony Society of New York, Inc., the Vivian Beaumont Theater Society of New York, Inc. and the Chamber Music Society of New York, Inc., to which substantially all of the assets have been distributed.

(6) Lila Acheson and DeWitt Wallace Fund for Lincoln Center elects to dissolve.

(7) The dissolution of Lila Acheson and DeWitt Wallace Fund for Lincoln Center was authorized by the unanimous written consent of both the Board of Directors and the Members as of the 10th day of May 2001.

(8) The plan of dissolution and distribution of assets was approved by a Justice of the Supreme Court of New York County on the 20th day of June 2001.

IN WITNESS WHEREOF, the undersigned has subscribed this certificate and hereby affirms it as true under the penalties of perjury this 17<sup>th</sup> day of August 2001.



Rob D. Nagel  
Treasurer

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

STANLEY PARNESS

PRESENT, HON. \_\_\_\_\_, Justice

In the Matter of the Application  
of

Lila Acheson and DeWitt Wallace  
Fund for Lincoln Center

DISSOLUTION  
ORDER - STAGE II

Index No. 11479/01

For an Order approving Certificate of Dissolution  
pursuant to Article 10 of the Not-for-Profit  
Corporation Law.

RECEIVED  
DEPARTMENT OF  
TAXATION AND FINANCE

OCT 23 2001

CORPORATION  
DISSOLUTION

Petitioner, Lila Acheson and DeWitt Wallace Fund for Lincoln Center, having duly applied for an order, pursuant to section 1003 of the Not-for-Profit Corporation Law of the State of New York, approving the certificate of dissolution of said petitioner corporation for filing, and a plan for the dissolution of petitioner and for the distribution of its assets having been approved by Hon. Stanley Parness, a Justice of the Supreme Court of the State of New York, on the 20<sup>th</sup> day of June 2001,

Now, on reading the petition of Lila Acheson and DeWitt Wallace Fund for Lincoln Center, duly verified on August 17, 2001, and all the exhibits annexed thereto, including the proposed certificate of dissolution, all submitted in support of the application, and no papers having been submitted in opposition thereto, and no one having appeared in opposition thereto, and the Attorney General of the State of New York having no objection thereto and due deliberation having been had thereon,

Now, upon motion of Shearman & Sterling, attorneys for the petitioner, it is

ORDERED, that the certificate of dissolution of Lila Acheson and DeWitt Wallace Fund for Lincoln Center be and the same hereby is approved for filing.

Enter,

THE ATTORNEY GENERAL, who appears herein  
HAS NO OBJECTION TO THE GRANTING OF  
JUDICIAL APPROVAL HEREON, ACKNOWLEDGES  
RECEIPT OF STATUTORY NOTICE AND DEMANDS  
SERVICE OF ALL PAPERS SUBMITTED HEREIN  
INCLUDING ALL ORDERS, JUDGMENTS AND  
ENDORSEMENTS OF THE COURT. SAID NO OBJECTION  
IS CONDITIONED ON SUBMISSION OF THE MATTER  
TO THE COURT WITHIN 30 DAYS HEREFTER.

OCT - 3 2001  
J.S.C.

James H. Acquisti  
ASSISTANT ATTORNEY GENERAL

11/5/01  
DATE

JUSTICE  
SUPREME COURT OF THE STATE OF NEW YORK  
FIRST JUDICIAL DISTRICT

PR-30,31 (7/96)

New York State Department of Taxation and Finance  
Albany, NY 12224

To: Secretary of State

Date: December 14, 2001

Name of Corporation

LILA ACHESON AND DEWITT WALLAGE FUND FOR LINCOLN CENTER

Pursuant to provisions of section 1003

of the Business Corporation Law of the State of New York

hereby consents to the Dissolution

Not for Public

of the above named corporation.

Certificate and fee are attached.

Filed by: SHEARMAN & STERLING  
599 LEXINGTON AVENUE  
NEW YORK, NEW YORK 10022-6069

Director, Department of Taxation and Finance

By

White Department of State

White Department of State

09340000068



Index No. 1147901

SUPREME COURT OF THE STATE OF  
NEW YORK  
COUNTY OF NEW YORK

In the Matter of the Application  
of  
Lila Acheson and DeWitt Wallace  
Fund for Lincoln Center

For an Order approving Certificate of Dissolution  
pursuant to Article 10 of the Not-for-Profit  
Corporation Law.

STATE OF NEW YORK  
DEPARTMENT OF STATE

DEC 18 2001

FILED  
TAXS  
BY:

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658

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CERTIFICATE OF DISSOLUTION

SHEARMAN & STERLING  
Petitioner  
Attorneys for.....

599 LEXINGTON AVENUE  
NEW YORK, N.Y. 10022-6069  
(212) 848-4000

*Jennifer Hunt MacDonald*  
Jennifer Hunt MacDonald

Exhibit D

INSTRUMENT OF GRANT

by

DEWITT WALLACE FUND, INC.

and

L.A.W. FUND, INC.

to

LILA ACHESON AND DEWITT WALLACE FUND

FOR

LINCOLN CENTER

WHEREAS, at meetings held on the 12th day of May, 1982, at which quorums were present, the Members and Directors of the DeWitt Wallace Fund, Inc., and the L.A.W. Fund, Inc., both incorporated under the laws of the State of New York (hereinafter collectively referred to as the "Foundations"), upon motion duly made and seconded, approved the grant of 200,000 shares and 50,000 shares, respectively, of Class A (non-voting) common stock of The Reader's Digest Association, Inc. held by the Foundations as of the date hereof (the "Gift Property") to the Lila Acheson and DeWitt Wallace Fund for Lincoln Center, incorporated under the Not-For-Profit Corporation Law of the State of New York (the "SO"); and

WHEREAS, the Internal Revenue Service has issued an appropriate determination or ruling as to the qualification of the SO under sections 501(c)(3) and 509(a)(3) of the Internal Revenue Code of 1954, as amended (the "Code"); and

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WHEREAS, at a meeting held on the 26th day of October, 1982, at which a quorum was present, the Members and Directors of the SO, upon motion duly made and seconded, duly adopted resolutions accepting the grants by the Foundations of the Gift Property to the SO; and

WHEREAS, DeWitt Wallace, the founder and sole contributor to the DeWitt Wallace Fund, Inc., and Lila Acheson Wallace, the founder and sole contributor to the L.A.W. Fund, Inc., have long supported the various companies associated with Lincoln Center;

NOW, THEREFORE, in consideration of the premises:

1. The Foundations do hereby give, transfer, assign, and deliver to the SO absolutely 250,000 shares of Class A (non-voting) common stock of The Reader's Digest Association, Inc. ("RDA"). Without limitation of the foregoing grant, it is the express wish that the income from said RDA Class A (non-voting) common stock be divided into 48 parts and allocated as follows among the constituent companies of Lincoln Center for the Performing Arts, Inc. to support new works or performances: 14 parts to the the Metropolitan Opera Association, Inc.; 10 parts to the New York City Ballet, Inc.; 9 parts to the New York City Opera, Inc.; 9 parts to the Vivian Beaumont Theater, Inc.; 4 parts to the Philharmonic-Symphony Society of New York, Inc.; and 2 parts to the Chamber Music Society of Lincoln Center, Inc.

09340000072

Without limiting the absolute nature of said grant, the SO may, in its discretion, and without regard to any contrary rule or provision of law, hold and retain indefinitely any or all of the said RDA Class A (non-voting) common stock and no duty to diversify such holdings shall be imposed or inferred as a condition hereof.

Because Mr. and Mrs. DeWitt Wallace, as owners of all of the voting common stock of RDA, have often expressed to the Directors of this Foundation their strong desire that RDA should not be viewed as a conventional commercial operation but rather as one whose growth and profitability should be largely devoted to eleemosynary purposes, it is the consensus of the Foundations that these goals can best be achieved by having the RDA non-voting common shares held by entities sympathetic to these objectives and by key employees of RDA rather than by third parties whose long term interest might diverge from, and even be antagonistic to, those expressed above.

Without limitation of these grants, therefore, it is the express wish of the Foundations that the members of the SO retain the Gift Property and enter into no arrangements for the sale or exchange of the Gift Property, except with RDA, so as to provide for the continuity of ownership and the continuation of the corporate policies which Mr. and Mrs. DeWitt Wallace have so often stressed.

The SO has been formed and the grants of the said RDA non-voting common shares to the SO from the Foundations are being effected with the above considerations in mind.

2. Nothing herein shall be construed to create a beneficial interest in the constituent companies of Lincoln Center for the Performing Arts, Inc. by these grants so as to preclude the members of the SO from amending its purpose or purposes from time to time to change the institution or institutions supported by it consistent with the provisions of sections 501(c)(3) and 509(a)(3) of the Code.

3. To effectuate the foregoing irrevocable grants to the SO of the Gift Property, concurrently with the execution hereof the Foundations are delivering to the SO the stock certificates in respect of said RDA non-voting common stock which certificates are registered in the name of the SO.

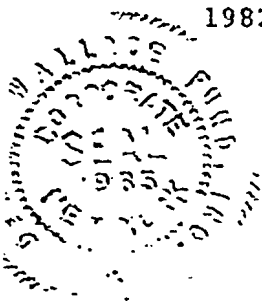
4. By subscribing this instrument, the SO hereby accepts the foregoing grants and delivery of the said stock certificates.

5. The terms of the Instrument and the grants made hereby shall be binding upon the Foundations and the SO and their respective successors and assigns.

6. This instrument is being executed in duplicate counterparts, either of which shall be 0934000074

be the sole original if the other is not produced, and shall be construed and enforced in accordance with, and governed by, the laws of the State of New York.

IN WITNESS WHEREOF, the Foundations and the SO have caused these presents to be executed by their respective duly authorized officers and have also caused their respective seals to be attached hereto as of the 26th day of October, 1982.



ATTEST:

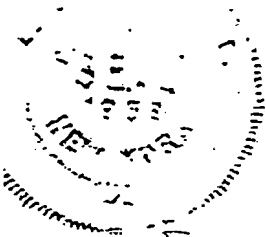
Christine DeVita

DEWITT WALLACE FUND, INC.

By

Barnabas McHenry

Barnabas McHenry, Secretary



ATTEST:

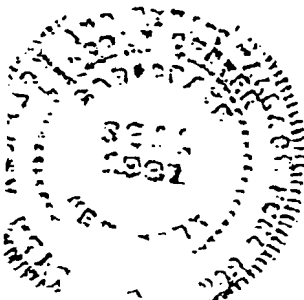
M. Christine DeVita

L.A.W. FUND, INC.

By

Barnabas McHenry

Barnabas McHenry, Secretary



ATTEST:

Art R. DeLuca

LILA ACHESON AND DEWITT WALLACE  
FUND FOR LINCOLN CENTER

By

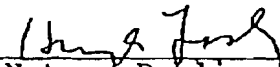
John W. Mazzola

John W. Mazzola, Vice President

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STATE OF NEW YORK )  
: SS.:  
COUNTY OF NEW YORK)

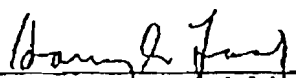
On the 26th day of October, 1982, before me personally appeared Barnabas McHenry, to me known and known to me, who, being by me duly sworn, did depose and say that he resides at 164 E. 72nd Street, NY, NY 10021; that he is Secretary of the DeWitt Wallace Fund, Inc., and the L.A.W. Fund, Inc. the corporations described in and which executed the foregoing instrument; that he knows the seals of said corporations; that the seals affixed to said instrument are such corporate seals; that they were so affixed by order of the Board of Directors of said corporations, and that he signed his name thereto by like order.

  
Notary Public

STATE OF NEW YORK )  
: SS.:  
COUNTY OF NEW YORK)

HARRY A. CASLEY  
Notary Public, State of New York  
No. 31-7437325  
Qualified in New York County  
Commission Expires March 30, 1984

On the 26th day of October, 1982, before me personally appeared John W. Mazzola, to me known and known to me, who, being by me duly sworn, did depose and say that he resides at 12 Beekman Place, NY, NY 10022; that he is the Vice President of the Lila Acheson and DeWitt Wallace Fund for Lincoln Center, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that he signed his name thereto by like order.

  
Notary Public

HARRY A. CASLEY  
Notary Public, State of New York  
No. 31-7437325  
Qualified in New York County  
Commission Expires March 30, 1984





INSTRUMENT OF GRANT

by

DEWITT WALLACE FUND, INC.

to

LILA ACHESON AND DEWITT WALLACE FUND

FOR

LINCOLN CENTER

WHEREAS, at a meeting held on the 1st day of December, 1982, at which a quorum was present, the Members and Directors of the DeWitt Wallace Fund, Inc., incorporated under the laws of the State of New York (hereinafter referred to as the "Foundation"), upon motion duly made and seconded, approved the grant of 200,000 shares of Class A (non-voting) common stock of The Reader's Digest Association, Inc. held by the Foundation as of the date hereof (the "Gift Property") to the Lila Acheson and DeWitt Wallace Fund for Lincoln Center, incorporated under the Not-For-Profit Corporation Law of the State of New York (the "SO"); and

WHEREAS, the Internal Revenue Service has issued an appropriate determination or ruling as to the qualification of the SO under sections 501(c)(3) and 509(a)(3) of the Internal Revenue Code of 1954, as amended (the "Code"); and

WHEREAS, by a written consent in lieu of meeting, dated as of March 14, 1983, the Members and Directors of the SO, unanimously adopted resolutions accepting the grant by the Foundation of the Gift Property to the SO; and

WHEREAS, DeWitt Wallace, the founder and sole contributor to the DeWitt Wallace Fund, Inc., has long supported the various companies associated with Lincoln Center;

NOW, THEREFORE, in consideration of the premises:

1. The Foundation does hereby give, transfer, assign, and deliver to the SO absolutely 200,000 shares of Class A (non-voting) common stock of The Reader's Digest Association, Inc. ("RDA"). Without limitation of the foregoing grant, it is the Foundation's express wish that the income from said RDA Class A (non-voting) common stock be divided into 48 parts and allocated as follows among the constituent companies of Lincoln Center for the Performing Arts, Inc. to support new works or new performances or productions: 14 parts to the the Metropolitan Opera Association, Inc.; 10 parts to the New York City Ballet, Inc.; 9 parts to the New York City Opera, Inc.; 9 parts to the Vivian Beaumont Theater, Inc.; 4 parts to the Philharmonic-Symphony Society of New York, Inc.; and 2 parts to the Chamber Music Society of Lincoln Center, Inc.

Without limiting the absolute nature of said grant, the SO may, in its discretion, and without regard to any contrary rule or provision of law, hold and retain indefinitely any or all of the said RDA Class A (non-voting) common stock and no duty to diversify such holdings shall be imposed or inferred as a condition hereof.

Because Mr. and Mrs. DeWitt Wallace, as owners of all of the voting common stock of RDA, have often expressed to the Directors of this Foundation their strong desire that RDA should not be viewed as a conventional commercial operation but rather as one whose growth and profitability should be largely devoted to eleemosynary purposes, it is the consensus of the Foundation that these goals can best be achieved by having the RDA non-voting common shares held by entities sympathetic to these objectives and by key employees of RDA rather than by third parties whose long term interests might diverge from, and even be antagonistic to, those expressed above.

Without limitation of these grants, therefore, it is the express wish of the Foundation that the members of the SO retain the Gift Property and enter into no arrangements for the sale or exchange of the Gift Property, except with RDA, so as to provide for the continuity of ownership and the continuation of the corporate policies which Mr. and Mrs. DeWitt Wallace have so often stressed.

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RDA non-voting cc' SO from the Founc, in its discretions  
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rs. DeWitt Wallace

6. This instrument is being executed in duplicate counterparts, either of which shall be deemed to be the sole original if the other is not produced, and shall be construed and enforced in accordance with, and governed by, the laws of the State of New York.

IN WITNESS WHEREOF, the Foundation and the SO have caused these presents to be executed by their respective duly authorized officers and have also caused their respective seals to be attached hereto as of the 25th day of April, 1983.

DEWITT WALLACE FUND, INC.

By

Barnabas McHenry  
Barnabas McHenry, Secretary

ATTEST:

M. Christine DeVita

LILA ACHESON AND DEWITT WALLACE  
FUND FOR LINCOLN CENTER

By

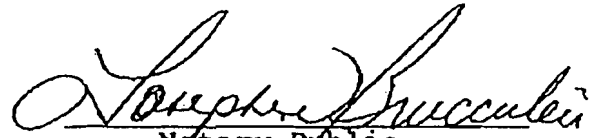
John A. O'Hara  
John A. O'Hara, President

ATTEST:

M. Christine DeVita

STATE OF NEW YORK )  
: SS.:  
COUNTY OF NEW YORK)

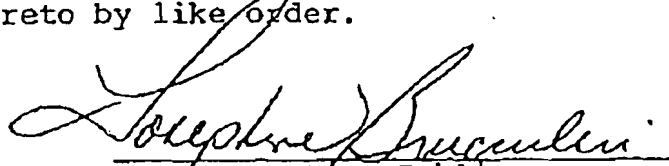
On the 25th day of April, 1983, before me personally appeared Barnabas McHenry, to me known and known to me, who, being by me duly sworn, did depose and say that he resides at 164 E. 72nd Street, NY, NY 10021; that he is Secretary of the DeWitt Wallace Fund, Inc., the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

  
Notary Public

STATE OF NEW YORK )  
: SS.:  
COUNTY OF NEW YORK)

JOSEPHINE BRUCCULERI  
Notary Public, State of New York  
No. 60-4647379  
Qualified in Westchester County  
Certificate Filed in New York County  
Commission Expires March 30, 1984

On the 25th day of April, 1983, before me personally appeared John A. O'Hara, to me known and known to me, who, being by me duly sworn, did depose and say that he resides at 188 Stanwich Road, Greenwich, CT 06830; that he is the President of the Lila Acheson and DeWitt Wallace Fund for Lincoln Center, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

  
Notary Public

JOSEPHINE BRUCCULERI  
Notary Public, State of New York  
No. 60-4647379  
Qualified in Westchester County  
Certificate Filed in New York County  
Commission Expires March 30, 1984

09340000083





INSTRUMENT OF GRANT

by

LAKEVIEW FUND, INC.

and

L.A.W. FUND, INC.

to

LILA ACHESON AND DEWITT WALLACE FUND  
FOR LINCOLN CENTER

WHEREAS, at meetings held on the 2nd day of February, 1984, the Members and Directors of Lakeview Fund, Inc. and the Members and Directors of the L.A.W. Fund, Inc., both incorporated under the Not-for-Profit Corporation Law of the State of New York (hereinafter collectively referred to as the "Foundations"), unanimously adopted resolutions approving the grants of 25,000 shares and 75,000 shares, respectively, of Class A (non-voting) common stock of The Reader's Digest Association, Inc. held by the Foundations (the "Gift Property") to the Lila Acheson and DeWitt Wallace Fund for Lincoln Center, incorporated under the Not-For-Profit Corporation Law of the State of New York (the "SO"); and

WHEREAS, the Internal Revenue Service has issued an appropriate determination or ruling as to the qualification of the SO under sections 501(c)(3) and 509(a)(3) of

the Internal Revenue Code of 1954, as amended (the "Code");  
and

WHEREAS, by a written consent in lieu of meeting dated as of February 3, 1984, the Members and Directors of the SO unanimously adopted resolutions accepting the grants by the Foundations of the Gift Property to the SO; and

WHEREAS, DeWitt Wallace, the founder and sole contributor to the Lakeview Fund, Inc., and Lila Acheson Wallace, the founder and sole contributor to the L.A.W. Fund, Inc., have long supported the various companies associated with Lincoln Center;

NOW, THEREFORE, in consideration of the premises:

1. The Lakeview Fund, Inc. does hereby give, transfer, assign, and deliver to the SO absolutely 25,000 shares of Class A (non-voting) common stock of The Reader's Digest Association, Inc. ("RDA"), and L.A.W. Fund, Inc. does hereby give, transfer, assign, and deliver to the SO absolutely 75,000 shares of Class A (non-voting) common stock of RDA. Without limitation of the foregoing grant, it is the express wish of the Foundations that the income from said RDA Class A (non-voting) common stock be divided into 48 parts and allocated as follows among the constituent companies of Lincoln Center for the Performing Arts, Inc. to support new works or new performance or productions: 14

parts to the Metropolitan Opera Association, Inc.; 10 parts to the New York City Ballet, Inc.; 9 parts to the New York City Opera, Inc.; 9 parts to the Vivian Beaumont Theater, Inc.; 4 parts to the Philharmonic-Symphony Society of New York, Inc.; and 2 parts to the Chamber Music Society of Lincoln Center, Inc.

Without limiting the absolute nature of said grants, the SO may, in its discretion, and without regard to any contrary rule or provision of law, hold and retain indefinitely any or all of the said RDA Class A (non-voting) common stock and no duty to diversify such holdings shall be imposed or inferred as a condition hereof.

Because Mr. and Mrs. DeWitt Wallace, as owners of all of the voting common stock of RDA, have often expressed to the Directors of the Foundations their strong desire that RDA should not be viewed as a conventional commercial operation but rather as one whose growth and profitability should be largely devoted to eleemosynary purposes, it is the consensus of the Foundations that these goals can best be achieved by having the RDA Class A (non-voting) common stock held by entities sympathetic to these objectives and by key employees of RDA rather than by third parties whose

long term interests might diverge from, and even be antagonistic to, those expressed above.

Without limitation of these grants, therefore, it is the express wish of the Foundations that the members of the SO retain the Gift Property and enter into no arrangements for the sale or exchange of the Gift Property, except with RDA, so as to provide for the continuity of ownership and the continuation of the corporate policies which Mr. and Mrs. DeWitt Wallace have so often stressed.

The grants of the said RDA Class A (non-voting) common stock to the SO from the Foundations are being effected with the above considerations in mind.

2. Nothing herein shall be construed to create a beneficial interest in the constituent companies of Lincoln Center for the Performing Arts, Inc. by these grants so as to preclude the members of the SO from amending its purpose or purposes from time to time to change the institution or institutions supported by it consistent with the provisions of sections 501(c)(3) and 509(a)(3) of the Code.

3. To effectuate the foregoing irrevocable grants to the SO of the Gift Property, concurrently with the exe-

cution hereof the Foundations are delivering to the SO the stock certificates in respect of said RDA Class A (non-voting) common stock, which certificates are registered in the name of the SO.

4. By subscribing this Instrument, the SO hereby accepts the foregoing grants and delivery of the said stock certificates.

5. The terms of the Instrument and the grants made hereby shall be binding upon the Foundations and the SO and their respective successors and assigns.

6. This Instrument is being executed in triplicate counterparts, any one of which shall be deemed to be the sole original if the others are not produced, and shall be construed and enforced in accordance with, and governed

by, the laws of the State of New York.

IN WITNESS WHEREOF, the Foundations and the SO  
have caused these presents to be executed by their  
respective duly authorized officers and have also caused  
their respective seals to be attached hereto as of the 3rd  
day of February, 1984.

L.A.W. FUND, INC.

By

LB9.14m  
Barnabas McHenry, Secretary

Attest:

M. Christine DeVita

LAKEVIEW FUND, INC.

By

LB9.14m  
Barnabas McHenry, Secretary

Attest:

M. Christine DeVita

LILA ACHESON AND DEWITT WALLACE  
FUND FOR LINCOLN CENTER.

By

John A. O'Hara  
John A. O'Hara, President

Attest:

M. Christine DeVita

STATE OF NEW YORK )  
: SS.:  
COUNTY OF NEW YORK)

On the 3rd day of February 1984, before me personally appeared Barnabas McHenry, to me known and known to me, who, being by me duly sworn, did depose and say that he resides at 164 E. 72nd Street, NY, NY 10021; that he is Secretary of the Lakeview Fund, Inc., the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

  
Notary Public

STATE OF NEW YORK )  
: SS.:  
COUNTY OF NEW YORK)

JOSEPHINE BRUCCULERI  
Notary Public, State of New  
No. 80-4847379  
Qualified in Westchester Co.  
Certificate Filed in New York County  
Commission Expires March 30, 1985

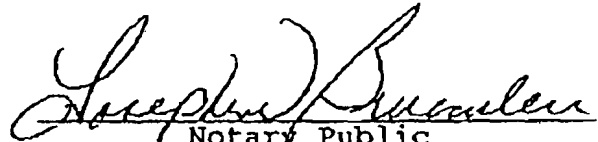
On the 3rd day of February 1984, before me personally appeared Barnabas McHenry, to me known and known to me, who, being by me duly sworn, did depose and say that he resides at 164 E. 72nd Street, NY, NY 10021; that he is Secretary of the L.A.W. Fund, Inc., the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

  
Notary Public

JOSEPHINE BRUCCULERI  
Notary Public, State of New York  
No. 80-4847379  
Qualified in Westchester County  
Certificate Filed in New York County

STATE OF NEW YORK       )  
                                  : SS.:  
COUNTY OF WESTCHESTER)

On the 3rd day of February, 1984, before me personally appeared John A. O'Hara, to me known and known to me, who, being by me duly sworn, did depose and say that he resides at 188 Stanwich Road, Greenwich, CT 06830; that he is the President of the Lila Acheson and DeWitt Wallace Fund for Lincoln Center, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

  
Notary Public

JOSEPHINE BRUCCULERI  
Notary Public, State of New York  
No. 60-4647379  
Qualified in Westchester County  
Certificate Filed in New York City  
Commission Expires March 30, 1985



Exhibit E

09340000093

ENDOWMENT AGREEMENT made as of this 30<sup>th</sup> day of April 2001 between the Lila Acheson and DeWitt Wallace Fund for Lincoln Center (the "SO") and the following constituent companies of Lincoln Center: the Metropolitan Opera Association, Inc.; the New York City Ballet, Inc.; the New York City Opera, Inc.; the Philharmonic-Symphony Society of New York, Inc.; the Vivian Beaumont Theater, Inc.; and the Chamber Music Society of Lincoln Center, Inc. (collectively the "Charities" or individually the "Charity").

WITNESSETH:

WHEREAS, the SO was created in 1982 for the benefit of the constituent companies of Lincoln Center for the Performing Arts, Inc., and in particular for the Charities; and

WHEREAS, the assets of the SO have grown from approximately \$34 million to more than \$359 million, and its investments have been diversified from virtually 100% in the Class A non-voting common stock of The Reader's Digest Association, Inc. ("RDA") to approximately 37% in RDA as of December 31, 2000; and

WHEREAS, since inception the SO has authorized grants of approximately \$186 million to the Charities to support new works, or new productions or new performances or to underwrite touring of new productions or repertory, or to support educational or audience outreach programs; and

WHEREAS, the SO believes that over the past 18 years the Charities have demonstrated appropriate sensitivity and commitment to the interests of Lila Acheson and DeWitt Wallace (the sole contributors to the Lila Wallace-Reader's Digest Fund and the DeWitt Wallace-Reader's Digest Fund, which are the original donors of the SO), and that each Charity is institutionally strong and capable of directly managing the assets that are proposed to be transferred to it upon the dissolution of the SO;

NOW, THEREFORE, in consideration of good and valuable consideration, receipt of which is hereby acknowledged, the parties hereto agree as follows:

- A. In accordance with the allocation provided in the Instrument of Grant to the SO in 1982 and consistent with historic practice, the assets of the SO shall be divided into 48 parts and allocated among the Charities as follows:

14 parts to the Metropolitan Opera Association, Inc.;  
10 parts to the New York City Ballet, Inc.;  
9 parts to the New York City Opera, Inc.;  
9 parts to the Vivian Beaumont Theater, Inc.;  
4 parts to the Philharmonic-Symphony Society of New York, Inc.; and  
2 parts to the Chamber Music Society of Lincoln Center, Inc.

- B. Each Charity hereby agrees to accept the assets transferred to it upon the dissolution of the SO and to maintain those assets in perpetuity as an endowment fund to be known as the Lila Acheson and DeWitt Wallace Endowment Fund (the "Endowment").
- C. The annual spending from the Endowment shall be determined by each Charity. In making this determination, each Charity agrees to apply a spending policy, as approved by that Charity's Board of Trustees, to the Endowment in no greater percentage and in the same manner as such spending policy is applied to each Charity's other endowment funds. The resulting sum is hereafter referred to as the "Annual Contribution." It is understood that the application of the spending policy may reduce the value of the Endowment to below its Original Fair Market Value, as hereinafter defined, in which case the Charity shall have no obligation to restore the Endowment to such Original Fair Market Value.
- D. Each Charity shall also be permitted, from time to time, to designate and expend a portion of the Endowment (a "Special Contribution"), provided that in each instance each of the following terms and conditions has been satisfied or observed:
1. A special majority of the Board of Trustees shall determine that an extraordinary need exists for one or more of the original specific purposes enumerated in Paragraph E below (the "Special Project") that the special majority of the Board reasonably believes cannot be readily satisfied out of other resources available to the Charity (including the Annual Contribution). As used in this Agreement the term "special majority" shall mean two-thirds of the then-acting members of the Board of Trustees of the Charity.

2. A special majority of the Board of Trustees shall approve the amount of the Special Contribution for the Special Project.
  3. A "Matching Contribution" shall be made to the Special Project by the Charity. A Matching Contribution shall mean contributions (not including loans or borrowings) from one or more sources, other than the Endowment Fund, which shall constitute in the aggregate at least twice the amount applied to the Special Project from the Endowment.
  4. The application of the Special Contribution shall not reduce the fair market value of the Endowment below eighty (80%) percent of the Original Fair Market Value of the Endowment. As used in this Agreement the term "Original Fair Market Value" shall mean the value of all assets transferred to the Charity by the SO pursuant to this Agreement, valued on the date of distribution.
  5. The Special Contribution, together with any and all prior Special Contributions, shall not exceed the Special Contribution Limit. As used in this Agreement the term "Special Contribution Limit" shall mean twenty (20%) percent of the Fair Market Value of the Endowment as of the date of the approval of the Special Contribution by the Board.
- E. In keeping with the donors' original intent, the Endowment's Annual Contribution shall be used to support new works or new productions or new performances, or to underwrite touring of new productions or repertory, or to support educational or audience outreach programs. Once these priority needs are met, as determined by each Charity, any sums remaining in the Annual Contribution may be used for other priority needs identified by the Charity. Each Charity shall acknowledge the Endowment as a supporter for all projects to which an expenditure from the Endowment is applied; such acknowledgment to be made in a manner consistent with that afforded by the Charity to other donors for gifts of similar size.
- F. Each Charity shall submit an annual report to the Attorney General of the State of New York, within six months after the close of each fiscal year ending on or prior to December 31, 2010, on the status of the programs funded by the Endowment. The

report shall include both narrative and financial accounts of how any expenditure from the Endowment was used, as well as the current fair market value of the Endowment and the Charity's approved annual spending rate. In addition, if a Special Contribution was made from the Endowment during any year, the report to the Attorney General of the State of New York shall include details of the Special Project and information and financial data to fully substantiate compliance with the provisions of Paragraph D. A courtesy copy of the report relating to Special Contributions shall be sent to the DeWitt Wallace-Reader's Digest Fund, Inc. and the Lila Wallace-Reader's Digest Fund, Inc. for their information.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed and delivered as of the date first written above by their respective officers thereunto duly authorized by their respective governing Boards.

LILA ACHESON AND DEWITT WALLACE  
FUND FOR LINCOLN CENTER

By George V. Grune  
Name George V. Grune  
Title President

METROPOLITAN OPERA ASSOCIATION, INC.

By \_\_\_\_\_  
Name \_\_\_\_\_  
Title \_\_\_\_\_

NEW YORK CITY BALLET, INC.

By \_\_\_\_\_  
Name \_\_\_\_\_  
Title \_\_\_\_\_

report shall include both narrative and financial accounts of how any expenditure from the Endowment was used, as well as the current fair market value of the Endowment and the Charity's approved annual spending rate. In addition, if a Special Contribution was made from the Endowment during any year, the report to the Attorney General of the State of New York shall include details of the Special Project and information and financial data to fully substantiate compliance with the provisions of Paragraph D. A courtesy copy of the report relating to Special Contributions shall be sent to the DeWitt Wallace-Reader's Digest Fund, Inc. and the Lila Wallace-Reader's Digest Fund, Inc. for their information.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed and delivered as of the date first written above by their respective officers thereunto duly authorized by their respective governing Boards.

LILA ACHESON AND DEWITT WALLACE  
FUND FOR LINCOLN CENTER

By \_\_\_\_\_  
Name \_\_\_\_\_  
Title \_\_\_\_\_

METROPOLITAN OPERA ASSOCIATION, INC.

By \_\_\_\_\_  
Name Joseph Volpe  
Title General Manager

NEW YORK CITY BALLET, INC.

By \_\_\_\_\_  
Name \_\_\_\_\_  
Title \_\_\_\_\_

09340000098

report shall include both narrative and financial accounts of how any expenditure from the Endowment was used, as well as the current fair market value of the Endowment and the Charity's approved annual spending rate. In addition, if a Special Contribution was made from the Endowment during any year, the report to the Attorney General of the State of New York shall include details of the Special Project and information and financial data to fully substantiate compliance with the provisions of Paragraph D. A courtesy copy of the report relating to Special Contributions shall be sent to the DeWitt Wallace-Reader's Digest Fund, Inc. and the Lila Wallace-Reader's Digest Fund, Inc. for their information.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed and delivered as of the date first written above by their respective officers thereunto duly authorized by their respective governing Boards.


LILA ACHESON AND DEWITT WALLACE  
FUND FOR LINCOLN CENTER

By \_\_\_\_\_  
Name \_\_\_\_\_  
Title \_\_\_\_\_

METROPOLITAN OPERA ASSOCIATION, INC.

By \_\_\_\_\_  
Name \_\_\_\_\_  
Title \_\_\_\_\_

NEW YORK CITY BALLET, INC.

By  \_\_\_\_\_  
Name HOWARD SOLOMON  
Title CHAIRMAN

NEW YORK CITY OPERA, INC.

By *Irwin Schneiderman*  
Name IRWIN SCHNEIDERMAN  
Title CHAIRMAN, BOARD OF DIRECTORS

VIVIAN BEAUMONT THEATER, INC.  
(d/b/a Lincoln Center Theater)

By \_\_\_\_\_  
Name \_\_\_\_\_  
Title \_\_\_\_\_

PHILHARMONIC-SYMPHONY SOCIETY  
OF NEW YORK, INC.

By \_\_\_\_\_  
Name \_\_\_\_\_  
Title \_\_\_\_\_

CHAMBER MUSIC SOCIETY OF  
LINCOLN CENTER, INC.

By \_\_\_\_\_  
Name \_\_\_\_\_  
Title \_\_\_\_\_



NEW YORK CITY OPERA, INC.

By \_\_\_\_\_  
Name \_\_\_\_\_  
Title \_\_\_\_\_

VIVIAN BEAUMONT THEATER, INC.  
(d/b/a Lincoln Center Theater)

By *Leontine L. Lasker*  
Name *Leontine Lasker*  
Title *Chairman*

PHILHARMONIC-SYMPHONY SOCIETY  
OF NEW YORK, INC.

By \_\_\_\_\_  
Name \_\_\_\_\_  
Title \_\_\_\_\_

CHAMBER MUSIC SOCIETY OF  
LINCOLN CENTER, INC.

By \_\_\_\_\_  
Name \_\_\_\_\_  
Title \_\_\_\_\_

NEW YORK CITY OPERA, INC.

By \_\_\_\_\_  
Name \_\_\_\_\_  
Title \_\_\_\_\_

VIVIAN BEAUMONT THEATER, INC.  
(d/b/a Lincoln Center Theater)

By \_\_\_\_\_  
Name \_\_\_\_\_  
Title \_\_\_\_\_

PHILHARMONIC-SYMPHONY SOCIETY  
OF NEW YORK, INC.

By \_\_\_\_\_  
Name \_\_\_\_\_  
Title \_\_\_\_\_

CHAMBER MUSIC SOCIETY OF  
LINCOLN CENTER, INC.

By Donaldson C. Pillsbury  
Name Donaldson C. Pillsbury  
Title Chairman of the Board

**Exhibit F**

09340000103

## **Michael M. Kaiser**

mmkaiser@kennedy-center.org  
202-416-8010

Michael M. Kaiser has been President of the John F. Kennedy Center since January 2001. Mr. Kaiser has expanded the educational and artistic programming for the nation's center for the performing arts and has overseen a major renovation effort of most of the Center's public spaces.

Signature artistic programs during his tenure have included an unprecedented celebration of the works of Stephen Sondheim; a major festival of the arts of China; long-term relationships with the Bolshoi Ballet, the Kirov Ballet and Opera, Royal Shakespeare Company and New York City Ballet; a country music festival; a retrospective of the works of Tennessee Williams, as well as a celebration of August Wilson's ten plays presented in sequential order.

Mr. Kaiser created the Kennedy Center Arts Management Institute to provide advanced training for young arts administrators and has developed a series of programs to help train others in the field. He has created a Capacity Building Program for Culturally Specific Arts Organizations, which offers mentoring services to the leaders of 35 African American, Latino, Asian American and Native American arts groups from across the United States. A similar program was instituted for 33 arts organizations in the City of New York. Mr. Kaiser is also a Cultural Ambassador for the State Department's CultureConnect program. He advises performing arts organizations around the world on building institutional strength through marketing, strategic planning and fundraising, and, in this capacity, is currently working with arts leaders in Mexico, Pakistan and China and throughout the Arab countries. He has created artsmanager.org, a website that provides resources to arts managers around the world.

Mr. Kaiser previously served as the Executive Director of the Royal Opera House, the largest performing arts organization in the United Kingdom. During his tenure with the Royal Opera House, that organization erased its historic accumulated deficit, completed £214 million redevelopment of the facility, created an endowment fund, and greatly increased its level of support from the private and public sectors.

Prior to joining the Royal Opera House, Mr. Kaiser was Executive Director of American Ballet Theatre. During his three-year tenure at ABT, Mr. Kaiser erased the entire historic accumulated deficit, created a second company, greatly expanded national and international touring activity, increased contributed and earned income substantially, and built an acclaimed series of education programs.

Mr. Kaiser has also served as Executive Director of the Alvin Ailey Dance Theater Foundation, the world's largest modern dance organization. During his tenure, the Ailey Company erased its accumulated deficit, expanded its school, and increased all forms of revenue. He has also served as General Manager of the Kansas City Ballet, where he erased the company's deficit.

As a consultant to a variety of arts organizations Mr. Kaiser advised such institutions as The Jewish Museum, the Market Theatre (Johannesburg), Detroit Symphony, Glimmerglass Opera, and many others. He also represented the United States on a commission that established the Arts Council of the Republic of South Africa.

Before entering the arts management field, Mr. Kaiser was a management consultant in the corporate sector. In 1985, he sold the consulting firm he founded, Kaiser Associates, which specializes in helping large corporations formulate strategic plans. Among his clients were General Motors, IBM, Corning Glass Works and 50 other major corporations. Kaiser Associates remains a major participant in the strategy-consulting field.

Mr. Kaiser has served as a research economist for Nobel prize-winning economist, Wassily Leontief, and is the author of three books: *Strategic Planning in the Arts: A Practical Guide* (1995); *Developing Industry*

*Strategies: A Practical Guide of Industry Analysis* (1983), and *Understanding the Competition: A Practical Guide of Competitive Analysis* (1981).

Mr. Kaiser received his Master's degree in Management from M.I.T.'s Sloan School of Management and his Bachelor's degree in Economics, Magna Cum Laude, from Brandeis University. He has been an Adjunct Professor of Arts Administration at New York University, and a Lecturer at the University of the Witwatersrand in Johannesburg.

He has received the Dance Magazine Award 2001, Capezio Award 2002, Helen Hayes Washington Post Award for Innovative Leadership in the Theater Community 2003, St. Petersburg 300 Medal 2004, Washingtonian of the Year 2004, US Department of State Citation 2005, Blacks in Dance Award 2005, First American to receive China's "Award for Cultural Exchange" 2005, and The Order of the Mexican Eagle 2006. Mr. Kaiser was named Impresario of the Year in 2006 by Musical America.

**Exhibit G**

# NEW YORK CITY OPERA

GEORGE STEEL  
GENERAL MANAGER AND  
ARTISTIC DIRECTOR

## About George Steel

A respected and innovative figure in the American performing arts, George Steel has achieved a notable record of success as a producer, administrator and multi-disciplinary programmer of opera, early and modern music, dance, film and theatre. Known for his fresh and revelatory approach to presenting the performing arts and for his dynamic talent for audience outreach, Mr. Steel, 42, has been hailed by *The New York Times* as “a spokesman of national stature about ways to make classical music matter to new generations of listeners.”

Born into a musical family, Mr. Steel began to perform regularly at age nine as a singer in the National Cathedral Choir in Washington, DC. Through the Choir, he met one of the formative influences on his career, Leonard Bernstein, and while still a student worked as Bernstein's production assistant on the revival of the composer's *Mass*. Mr. Steel subsequently attended Leonard Bernstein's conducting seminar at the Tanglewood Institute for four consecutive summers, 1986-1989. After attending St. Albans School in Washington, DC, Mr. Steel taught music and social studies at St. Augustine School of the Arts in the South Bronx and then attended Yale University, graduating with a BA in music in 1994.

Mr. Steel first made his mark in New York City as Managing Producer of the Tisch Center for the Arts at the 92<sup>nd</sup> Street YW-YMHA. From 1995 to 1997 he created a variety of new series (including *Today's Composers* and Dawn Upshaw's *Voices of the Spirit*), produced Haydn's *Philemon and Baucis* and Michael Korie and Stewart Wallace's *Hopper's Wife* (the latter co-produced with the Long Beach Opera) and was responsible for budget, production, marketing, contract negotiations and artist relations.

Mr. Steel then became the Executive Director of the Miller Theatre at Columbia University, where over the course of an eleven-year tenure (1997-2008) he transformed this venue into one of New York's most acclaimed showcases for early and modern music. Among his many innovations at the Miller, he introduced full-scale opera productions with such notable works as the U.S. premiere of Iannis Xenakis's *Oresteia*, the New York stage premiere of Elliott Carter's *What Next?*, and the U.S. stage premiere of Olga Neuwirth's *Lost Highway*. While programming 60 to 80 events a year, he took primary responsibility for fundraising, financial and personnel management, marketing, publicity, and facility planning.

Mr. Steel also has been active throughout this period as a conductor and performer, having founded the Vox Vocal Ensemble in 1995 and the Gotham City Orchestra in 1998.

For his work, Mr. Steel has twice received the Chamber Music America Award for Adventurous Programming (2001-02 and 2005), as well as the 2003 Trailblazer Award from the American Music Center and the 2003 ASCAP Concert Music Award. *New York* magazine named him as one of the most influential people in New York in 2006 and in 2005 listed his Miller Theatre as having the “Best Music Programming before 1800 or after 1990” and the “Best Night at the Ballet.”

In February 2009, George Steel was appointed as the new General Manager and Artistic Director of New York City Opera. His plans for the company include broadening the company's adventurous

# NEW YORK CITY OPERA

GEORGE STEEL  
GENERAL MANAGER AND  
ARTISTIC DIRECTOR

approach to repertory, nurturing the work of American artists and promising singers, and the continued development of the company's acclaimed education and outreach programs.

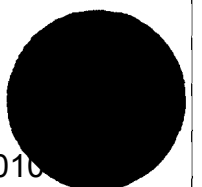




Exhibit H

In re Wolseley

N.Y.Sur.,2005.

(The decision of the Court is referenced in a table in the New York Supplement.)

Surrogate's Court, Suffolk County, New York.

In the Matter of Charles William WOLSELEY,

Deceased.

No. 582 P 1979.

Dec. 23, 2005.

Garfunkel, Wild & Travis, P.C., Great Neck, attorneys for Petitioner.

Eliot Spitzer, Esq., Attorney General of the State of New York, Charities Bureau, New York, for ultimate charitable beneficiaries.

JOHN M. CZYGIER, J.

\*1 This is a proceeding by Central Suffolk Hospital Association, as beneficiary of a certain trust created under the last will and testament of this decedent, for permission pursuant to EPTL 8-1.1 ("*cy pres*") to use the principal and interest of the trust fund to pay down its debt and finance an expansion and modernization project.

Jurisdiction has been obtained over all necessary parties to this proceeding. The Attorney General, Eliot Spitzer, who is a necessary party to this proceeding has appeared and has no objection to the relief requested in the petition.

Pursuant to Article FOURTH of decedent's will, a trust was created for the lifetime benefit of certain named individuals and funded with the estate residue. Upon the death of the surviving income beneficiary, the trustee is to pay over the trust's corpus with accrued income to petitioner "to be used and applied for its Ophthalmology Service, ... to enable said Hospital to increase its services to the community, where I reside, to the end that it shall receive the largest sum available herein for such community needs."The trust was initially funded with approximately \$1.4 million dollars and has a current value of approximately \$14 million dollars. The surviving income beneficiary died in August of this year and, pursuant to the terms of decedent's will, the

trustee has paid over approximately eighty percent of the trust fund to petitioner. Due to the restrictive language, petitioner seeks application of the *cy pres* doctrine to accomplish the general charitable purposes of the testator by authorizing the use of trust principal and income to implement its revitalization plan. There is no gift-over provision in the event the disposition fails.

Petitioner is a voluntary not-for-profit hospital corporation organized and existing for the purpose of delivering health care services to the surrounding community. Although ophthalmology services are provided by petitioner, last year there were only seven patients admitted to the hospital for eye related disorders and approximately five hundred emergency or outpatients visits. Petitioner is in the midst of a fiscal crisis which threatens its viability. It appears that this crisis is due to several factors, including decreasing reimbursement for services and/or capital improvements, its limited capacity to serve a growing community and the obsolescence of its facilities. The hospital, as part of a comprehensive plan, seeks to regain financial stability through a combination of debt restructuring and modernization, including expansion and modernization of its ophthalmology department. This plan is vital to the continued viability of the hospital.

The *cy pres* doctrine, codified in EPTL 8-1.1, is based on a policy to effectuate the general charitable intention of a testator when his specific donative direction cannot be carried out, or is no longer practicable. Under the statute, the Court has the authority to direct the manner in which a charitable disposition should be administered in order to most effectively accomplish the testator's intent whenever literal compliance with the terms of a charitable bequest is impracticable or impossible. This is done by devoting the property placed in trust to a use that furthers the testator's general intention and avoids the circumstances that have rendered the original instructions impracticable.

\*2 Before the doctrine may be applied, three tests must be met. First, a charitable gift or bequest must be made. Second, the testator must have demonstrated a general, as opposed to a specific,

**Unreported Disposition**

charitable intent. Third, circumstances must have changed in the period subsequent to the gift or bequest so as to render literal compliance impractical or impossible (see *Matter of St. Charles Hospital v. Vacco*, NYLJ, Aug. 4, 1995, at 25, col 6).

There can be no doubt that the funds in petitioner's possession are the result of a charitable bequest. Although the testator intended to improve and promote ophthalmology services offered by petitioner's facility, it is clear from his will that his general charitable intent was focused on increasing the hospital's ability to service the community as a whole. Here, the absence of a gift-over provision is a manifestation that the testator had a general charitable intent (see *In re Will of Goehringer*, 69 Misc.2d 145). Lastly, decedent could not have anticipated that his bequest would grow tenfold or that there would be significant changes in medicine which would make literal compliance impracticable.

By utilizing the funds as requested, petitioner will be able to obtain financing for the expansion and renovation of the hospital to carry out the wishes of the decedent. Without the financing necessary to undertake the modernization, petitioner may be forced to reduce community related programs and services which it provides at no charge or into bankruptcy. Indeed, the detailed record before the Court on this application indicates that without the ability to utilize the funds as requested, the hospital's continued existence would be in jeopardy, that is, if the use of the funds was limited solely to ophthalmology purposes, the consequence could be a failure of the hospital itself and the loss to the community of a valued medical facility. Such a result would obviously frustrate the charitable intent of the testator (see *Matter of Othmer*, 185 Misc.2d 122).

Accordingly, in exercise of its discretionary powers, the Court grants the relief requested by petitioner.

N.Y.Sur.,2005.

In re Wolseley

10 Misc.3d 1077(A), 814 N.Y.S.2d 893, 2005 WL 3726198 (N.Y.Sur.), 2005 N.Y. Slip Op. 52251(U)

END OF DOCUMENT

Exhibit I

New York Law Journal  
Volume 214, Number 24  
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Friday, August 4, 1995

Court Decisions  
Second Judicial Department  
Suffolk County  
Surrogate's Court

MATTER OF ST. CHARLES HOSPITAL, PORT JEFFERSON, N.Y. V. VACCO

Surrogate Prudenti

In this uncontested application by St. Charles Hospital and Rehabilitation Center, as beneficiary of a certain trust created under the last will and testament of the decedent herein, petitioner seeks the court's permission pursuant to EPTL §8-1.1 to use the principal and interest of the trust fund, known as the "Walden Trust" as security for letters of credit required to finance the hospital's expansion and modernization project.

The hospital is a voluntary, not-for-profit hospital corporation organized and existing for the purpose of delivering health care services to its Suffolk County patient community. The Attorney General, Dennis C. Vacco, Esq., who is a necessary party to this proceeding has appeared and has no objection to the relief requested in the petition.

The hospital as part of a comprehensive plan, restructured its programs to move towards an expansion of the hospital's rehabilitative services. As a result, an aggressive facility reconstruction project was undertaken at a cost of \$74,900,000. The hospital has obtained financing for 90% of this amount, the remaining 10% is to be the "equity contribution" which is being met by a capital campaign. The capital campaign has proven successful and pledges have been made to meet the full amount of the equity contribution, however, the pledges have not been collected in full and may not be collected in time for the commencement of the project. The financing permits the hospital to post an irrevocable, unconditional letter of credit to guarantee that the equity contribution will be invested in the project after all of the mortgage proceeds are spent. As security for the letters of credit, the hospital intends to post the uncollected campaign pledges, \$6,300,000 in cash, marketable securities and collected campaign pledges as well as the Walden Fund, at issue. The construction project is vital to the continued viability of the hospital.

At Article Sixth of the decedent's will the decedent devised a portion of the residuary estate to the petitioner for the creation of the Walden Fund, "of which the income shall be expended for charitable purposes." [Emphasis added.] Due to

the restrictive language with respect to "income only" and silence as to the use of the principal, the petitioner seeks application of the cy pres doctrine to accomplish the general charitable purposes of the donor by authorizing the use of trust principal and income as security for petitioner's financing.

The cy pres doctrine codified in EPTL §8-1.1, is based on a policy to effectuate the general charitable intention of a donor or testator where their specific donative direction cannot be carried out, or is no longer practicable. This is done by devoting the property placed in trust to a use, that furthers the donor's or testator's general intention and avoids the circumstances that have rendered the original instructions impracticable.

Before the doctrine may be applied, three tests must be met. First, a charitable gift or bequest must be made. Second, the donor must have demonstrated a general, as opposed to a specific, charitable intent. Third, circumstances must have changed in the period subsequent to the gift or bequest so as to render literal compliance impractical or impossible. *Matter of Staten Island University Hospital, (Richmond County - Surrogate D'Arrigo), N.Y.L.J. 4/23/93, p. 27, col. 4.*

Unquestionably, the funds in the hospital's possession are the result of charitable bequests. Any gift or bequest left for the promotion or advancement of health or medicine has always been recognized as a charitable gift. *Id.*; *In re Lawless' Will, 194 Misc.844, aff'd, 277 App. Div. 1045.*

The testator herein had a general charitable intent as opposed to merely benefiting a specific charity in a specific manner. A significant indicia of general versus particular intent is the presence or absence of a specific giftover in the event the charitable disposition fails. Absence of a giftover is a manifestation that the testator had a general charitable intent. (*In re Will of Goehrnaer, (69 Misc.2d 145) (329 N.Y.S.2d 516) (1972).* In the Walden Fund there is no giftover of the corpus. Moreover, the decedent, at paragraph Eighth of the will, authorized his fiduciary to utilize any charitable dispositions for general charitable purposes, if the specific purpose of such disposition could not be accomplished.

The doctrine is also present here in that literal compliance with the terms and provisions of the gift is impractical or impermissible. The total annual income produced by the Walden Fund in 1994 was only \$24,256.00, this income does little to assist the hospital's obligations to the community. The use of the principal and income of the Fund will make it possible for the hospital to obtain financing for the expansion and renovation of the hospital to carry out the wishes of the donor. The record reflects that the hospital's transition to the rehabilitation services exacerbated the inadequate existing conditions of its physical facilities. Without the financing necessary to undertake the modernization and compliance with health and building codes the hospital would be forced to shut down. Such a result would frustrate the purposes of the Walden Trust Fund expressed by the donor: "to benefit the aged, the children, the crippled and the blind, and to bring to individuals, young and old, needy or afflicted, assistance to make their lot more comfortable and happier."

Accordingly, the court having determined that only can truly effectuate the

charitable intentions of the donor, the application of the hospital is hereby granted.

Order signed.

8/4/95 NYLJ 25, (col. 6)

END OF DOCUMENT

Exhibit J



SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

_____	X
	: PETITION FOR
	: CY PRES RELIEF
In the Matter of the Application of	: PURSUANT TO
	: §8-1.1(c) OF NEW YORK
THE COOPER UNION	: ESTATES, POWERS AND
FOR THE ADVANCEMENT OF SCIENCE	: <u>TRUSTS LAW</u>
AND ART	:
<i>Petition for cy pres Relief</i>	: Index No.
<i>Pursuant to § 8-1.1(c) of N.Y. EPTL</i>	
_____	X

The Cooper Union for the Advancement of Science and Art, by its counsel  
Paul, Weiss, Rifkind, Wharton & Garrison LLP, respectfully alleges as follows:

**Nature of the Action**

1. This is an application for cy pres relief pursuant to the provisions of Section 8-1.1(c) of the New York Estates, Powers and Trusts Law (the "EPTL") to permit The Cooper Union for the Advancement of Science and Art ("The Cooper Union") to mortgage the Chrysler Building, which is owned by its endowment, as security for a \$175 million loan and to use the proceeds of that loan in excess of the historic dollar value of the gift of the property for The Cooper Union's general charitable purposes.

2. The Board of Trustees of The Cooper Union, in response to the immediate need to modernize outdated facilities and financial pressures, both of which may challenge its accreditation, has approved a financial plan to address these current problems and to build a sustainable future for The Cooper Union.

3. The Chrysler Building is The Cooper Union's most valuable real estate asset and necessarily a key part of the plan to preserve The Cooper Union's future.

A new ground lease is being negotiated that will greatly increase revenue from the building to The Cooper Union beginning in 2018. The proposed financing and the use of the proceeds thereof for The Cooper Union's charitable purposes, for which The Cooper Union seeks this Court's approval, allows the institution to continue its mission and address its current challenges by realizing today some of the benefits of these future increases in income.

#### **The Parties**

4. The Cooper Union is a not-for-profit corporation, incorporated by an 1859 act of the New York legislature, located at Cooper Square, New York, New York 10003-7120. It is an all honors college and one of America's most selective institutions of higher education, perennially ranked among the nation's top three specialized colleges. The Cooper Union consists of three degree-granting schools: The Irwin S. Chanin School of Architecture, The Albert Nerken School of Engineering and The School of Art.

5. In accordance with EPTL § 8-1.1(f), the Attorney General of the State of New York is an interested party to this proceeding.

#### **Jurisdiction and Venue**

6. This Court has jurisdiction over this matter and venue is proper in this County pursuant to EPTL § 8-1.1(c) as The Cooper Union has its offices and carries out its charitable mission principally in this County and the applicable gift instrument is not a will.

#### **Background Facts**

##### **The Founding of The Cooper Union**

7. The Cooper Union was founded by the industrialist, inventor and philanthropist Peter Cooper in 1859 pursuant to an amended act of the New York State legislature "to enable Peter Cooper to found a Scientific Institution in the City of New York" (the "1859 Act").

8. Peter Cooper was born in New York City on February 12, 1791 to a family of modest means and had only a limited amount of formal education. He rose to become one of the most successful industrialists in the City and wanted to give talented young people access to the type of education he had never been able to receive by creating a school devoted to science and art.

9. The Cooper Union's charter (the "Charter"), the first version of which appears in the 1859 Act, contains a list of five primary purposes for which it was incorporated by the legislature. One of the primary purposes expressly contained in the Charter is the creation of a premiere technological school:

4. As soon as, in the opinion of the Board of Trustees, the funds which shall from time to time be at their disposal, will warrant such an expenditure, such funds shall be appropriated to the establishment and maintenance of a thorough polytechnic school; the requirements to admission to which shall be left to the discretion of the said Board of Trustees, and shall be specifically determined by them from time to time; and which school shall, as far as possible, and as soon as possible, be made equal to the best technological schools now established, or hereafter to be established. (Emphasis added.)

10. Peter Cooper donated the school's first building, the Foundation Building, located on the south side of Astor Place and still the heart of the campus today. He viewed The Cooper Union as his legacy for future generations, stating in a speech a few months after its opening:

This building has scarcely been absent from my thoughts a single day, for nearly thirty years. I have laboured for it by night and by day with an intensity of desire that can never be explained. It is now my fervent hope that the youth of my native city and country will constantly throng these halls, with eager efforts to gain that kind of useful knowledge which is needed to make them wise, good, and useful to themselves and to their country.

### The Cooper Family and The Chrysler Building Land

11. In 1902, the fee parcel upon which the Chrysler Building now sits was conveyed to The Cooper Union by Edward Cooper and Abram S. Hewitt, as Trustees, and by Peter Cooper's children, Edward Cooper and Sarah Amelia Hewitt, individually, "for the purpose of constituting an endowment" for the school "for its uses, intents and purposes."

12. Edward Cooper and Sarah Amelia Hewitt were the children of Peter Cooper, and Abram S. Hewitt was Sarah Amelia Hewitt's husband. Edward Cooper and Abram S. Hewitt were also members of the first Board of Trustees of The Cooper Union and each served as President of the Board. Each of these individuals was devoted to the legacy of Peter Cooper and The Cooper Union.

13. In fact, the minutes of the meeting of the Board of Trustees of February 4, 1902 reflect that the children of Peter Cooper "have agreed to convey absolutely in fee to the Cooper Union" the property, now known as the Chrysler Building. The minutes further reflect that the value of the property in 1902 was \$600,000.

14. In 1971, The Cooper Union was granted the authority to mortgage any of its property, other than the Foundation Building given to it by Peter Cooper in 1859, pursuant to a New York Supreme Court Order entered on August 6, 1971 granting The Cooper Union's cy pres application requesting such relief. Prior to 1971, The Cooper Union's Charter had not provided for the authority to mortgage its property.

15. The Cooper Union estimates that the current fair market value of the Chrysler Building is in excess of \$415 million and its value to The Cooper Union based on projected cash flow (taking into account tax equivalency payments to The Cooper Union), as described below, is approximately \$700 million. This exponential rise in value could not have been foreseen by the children of Peter Cooper at the time they

made their gift in 1902 and, given their devotion to the institution that represents their father's legacy, it is indisputable that they would desire the benefits of this incredible increase in value to be available for the needs of The Cooper Union, were they living today.

### **The Cooper Union Today and the Plan for Tomorrow**

16. Today, The Cooper Union is widely recognized for its outstanding academic programs in architecture, art and engineering. Students are admitted to The Cooper Union on the basis of merit alone: the college does not provide any form of consideration for legacy, patronage, or athletic ability. Faculty, students and alumni continue to win a disproportionate share of the nation's most prestigious fellowships, academic and creative awards.

17. Despite its many academic strengths, The Cooper Union currently faces the possibility that it will become unable to carry out its statutory mission in the not-too-distant future.

18. The Cooper Union needs to upgrade outdated facilities in order to address concerns about its continuing accreditation and for it to continue to attract and maintain the best and brightest faculty and student body. At the same time, it currently faces a grave fiscal crisis.

### **The Current Fiscal Crisis and Antiquated Facilities**

19. The Cooper Union has experienced significant financial challenges and operating deficits, which recently have become acute.

20. Unlike most other schools, however, The Cooper Union does not receive any revenues in the form of tuition. All students admitted to The Cooper Union's degree programs receive a full-tuition scholarship, which allows talented students of all economic backgrounds to attend, in accordance with Peter Cooper's vision.

21. At the same time, it is clear that modernization of facilities is essential to maintain The Cooper Union's standing as one of the nation's premiere undergraduate colleges, to follow the mandate of the charter to be equal to the best technological schools and address concerns about its accreditation.

22. The Cooper Union has not erected an academic building in half a century. The current building used by the Engineering School was constructed in the 1950s, has inadequate ventilation, lacks modern technological capabilities and several of its advanced science laboratories are obsolete. New laboratories are required to accommodate the evolution of curricula necessitated by advances in science, engineering and technology. Modern technological infrastructure is required in order to maintain high speed computers, simulation capabilities, networking, multimedia communications, web-based interactions and advanced audiovisual capabilities essential to the study of art, architecture and engineering today.

23. In fact, one of the school's primary accreditation bodies, the Middle States Commission on Higher Education, has repeatedly expressed its dissatisfaction with the current state of the finances and facilities of The Cooper Union. Another accreditation body for the School of Architecture, the National Architectural Accrediting Board, determined in 2004 that the school's facilities did not meet its standards.

24. In order for The Cooper Union to address these issues, ensure its continued accreditation, maintain its academic standing, and recruit and retain the best students and faculty, it is essential to renew and modernize the school's facilities.

#### The Cooper Union's Plan for the Future

25. After careful deliberation, The Board of Trustees has committed to a plan designed to address the current challenges and secure the financial and academic future of The Cooper Union.

26. To address the needs of the institution for modern facilities, the Board of Trustees is resolved to proceed with the construction of a new academic building as well as with the renovation of its Foundation Building, which is the building constructed by Peter Cooper and given to the institution when it was established. This project is estimated to cost \$130 to \$155 million.

27. The new academic building, which will be located on the east side of Third Avenue, between 6th and 7th Streets, will house the School of Engineering and also provide institutional space for the Humanities and Social Sciences, the School of Architecture and the School of Art. The design not only incorporates state of the art technological infrastructure necessary for the specialized programs of Engineering, Architecture and Art that are The Cooper Union's focus, it also is designed to address the institution's need for energy efficiency and for future flexibility, containing reconfigurable spaces that will be able to evolve with the institution's changing needs over time.

28. To address the needs of the institution for a sustainable financial future, the Board of Trustees and the President have developed and begun to implement a financial plan (the "Master Plan") to complete the construction project, eliminate over time the operating deficits and produce a more reliable and stable revenue stream.

29. The Master Plan is composed of several interconnected initiatives: a commitment by the administration to reduce operating expenditures by 10% by 2011; a \$250 million capital campaign, which has already raised \$129 million; the expansion of the effort to increase annual giving; the completion of the construction project; the adoption of investment strategies designed to invest prudently liquid assets to maximize returns while preserving principal; and, the development of underutilized real estate assets and revenue growth from existing real estate assets.

### Maximizing The Cooper Union's Real Estate Assets

30. Real estate assets represent the largest class of assets held by The Cooper Union and therefore are an essential part of any fiscal strategy for its future.

31. The Cooper Union has identified three smaller properties not necessary to the institution that will be sold. The institution expects to receive approximately \$10 million from those sales during the current fiscal year.

32. The 1859 Act provided that property acquired by The Cooper Union is exempt from taxation, provided that any revenues therefrom are used for the institution's charter purposes. (The 1859 Act was later amended by the legislature so that only properties acquired by The Cooper Union prior to July 1, 1969 are so exempt.) On properties specifically exempt as provided in the statute, such as the Chrysler Building, The Cooper Union collects from its lessees payments equal to the tax that would otherwise be payable, called tax equivalency payments.

33. The property located at 26 Astor Place is an exempt property under the statute that just a few years ago was a parking lot. In order to maximize the return on that site, The Cooper Union has entered into a 99-year lease under which the institution is to receive semi-annual tax equivalency payments from the lessee. Due to a dispute with the City of New York over whether the property qualifies for tax exemption under a 1969 amendment to the 1859 Act, The Cooper Union currently is not receiving this revenue stream. While the institution hopes to resolve this matter so that it may rely on this source of revenue, it is possible that litigation may need to be commenced and that therefore it may take some time to resolve.

34. In addition, the completion of the new building on Third Avenue will allow the site of the current engineering building to become available for development. This also will allow The Cooper Union to enter into another long-term



lease arrangement in connection with development on that property, which should provide a stable source of revenue.

#### The Role of the Chrysler Building in the Master Plan

35. The Chrysler Building is by far The Cooper Union's greatest asset and therefore is necessarily an important part of the institution's financial future.

36. The first step taken by The Cooper Union in relation to the Chrysler Building in accordance with the Master Plan has been to negotiate a more favorable ground lease with the building's current tenant. The Cooper Union currently receives approximately \$7 million annually under the ground lease, which it receives in addition to the tax equivalency payments described above. The new ground lease, which we anticipate will be finalized and signed this fiscal year, will increase the lease payments to \$32.5 million in 2018, \$41 million in 2028 and \$55 million in 2031, thereby providing The Cooper Union with a reliable increased revenue stream.

37. While the increase in the lease payments is good news for the institution and is expected to maintain the institution in the future, it does not assist in addressing fully today's financial challenges. Therefore, as part of the Master Plan, the Board of Trustees also has determined that it would use its interest in the Chrysler Building as security to obtain up to \$175 million in financing, which will allow the institution to continue with its mission by realizing the benefits of some of this anticipated future income stream immediately. A portion of this financing will be used to meet future operating deficits until 2018, the year in which the increases in the ground lease payments take effect and \$600,000 will be placed in an endowment fund account to ensure the preservation of the historic dollar value of the gift from Peter Cooper's children. In order to prevent The Cooper Union from carrying an additional annual financial burden between now and 2018, it is anticipated that the terms of the financing

will be structured so that the institution will not have to make principal payments prior to that year.

38. The Cooper Union seeks this Court's permission to move forward with this component of the Master Plan because it believes that the plan as a whole is prudent, reasonable, in the long-term best interest of the institution and should eliminate operating deficits by 2013. The Cooper Union believes that implementation of the Master Plan is necessary in order to secure its financial future.

39. As stated above, The Cooper Union estimates that the current fair market value of the Chrysler Building is in excess of \$415 million. This figure does not take into account the tax equivalency payments received by The Cooper Union, which, upon information and belief, add at least another \$280 million of value to The Cooper Union. Even after the financing is complete, The Cooper Union's remaining interest in the Chrysler Building therefore will remain vastly in excess of its historic dollar value.

40. The Board of Trustees of The Cooper Union is aware that, it could sell the Chrysler Building and thereby realize and appropriate the appreciation of the property in excess of its historic dollar value (approximately \$415 million of appreciation). To do so, however, would be imprudent because The Cooper Union would not be able to realize the significant value of the tax equivalency payments in any sale because they are unique to the institution and not transferable. Furthermore, the Chrysler Building property is a gift from the children of Peter Cooper, one of the first significant donations to the institution, and an important historical piece for the disciplines of art, architecture and engineering that are the heart of The Cooper Union.

41. Therefore, The Board of Trustees does not believe that an outright sale of the Chrysler Building is the best long-term solution to its current fiscal difficulties and has chosen instead to mortgage the property while maintaining substantial equity

value and to use the financing proceeds for its charitable purposes, a course of action that requires the approval of this Court, which The Cooper Union respectfully seeks.

42. The deed by which the children of Peter Cooper conveyed the property to The Cooper Union states that the property is conveyed to the school “for the purpose of constituting an endowment” for the school “for its uses, intents and purposes[.]” This broad language clearly evidences the intent on the part of the donors, consistent with their dedication to the school’s mission and their father’s legacy during their lifetimes, to provide the school with maximum flexibility in relation to this gift.

43. Furthermore, the August 6, 1971 Order of the New York Supreme Court expanded The Cooper Union’s authority over its property—which was limited pursuant to its original Charter— and expressly provided that The Cooper Union may “buy, sell, exchange, mortgage, let and otherwise use and dispose of its property, or borrow, as the trustees shall deem advisable[.]” The Foundation Building, deeded to The Cooper Union by Peter Cooper at the founding of the institution in 1859, was the only building owned by The Cooper Union exempted from the mortgage power granted to the Board of Trustees in 1971.

44. As stated above, The Cooper Union is gravely concerned that its mission will be compromised if it is unable to implement its Master Plan, which includes using the Chrysler Building as security for financing and using the financing proceeds for its charitable purposes, and therefore seeks this Court’s permission in order to move forward. The restriction under New York law that does not allow The Cooper Union to use an asset that has increased to roughly 1,000 times its historic dollar value as security for financing that is desperately needed to secure the future of the institution is, in this situation, impracticable or impossible and will frustrate the intent of the donors, the children of Peter Cooper, to provide for The Cooper Union to be a first-class institution in all respects.

### CLAIM FOR RELIEF

45. The Cooper Union repeats and realleges paragraphs 1 through 44 above as if fully set forth herein.

46. Section 8-1.1(c) of the New York Estates, Powers and Trusts Law states that “whenever it appears to [the] court that circumstances have so changed since the execution of an instrument making a disposition for religious, charitable, educational or benevolent purposes as to render impracticable or impossible a literal compliance with the terms of such disposition, the court may . . . make an order or decree directing that such disposition be administered and applied in such manner as in the judgment of the court will most effectively accomplish its general purposes, free from any specific restriction, limitation or direction contained therein[.]”

47. Accordingly, The Cooper Union should be granted permission to use the Chrysler Building as security for loan of up to \$175 million and The Cooper Union should be granted cy pres relief releasing it from the restrictions imposed by law due to the endowment language contained in the 1902 deed, which restrictions are impracticable or impossible, to such an extent as to allow the proceeds from the financing (above the property’s historic dollar value) to be used for the construction of a new academic building, renovations to its Foundation Building, to divest endowment funds invested in the ground lease in the Chrysler Building, to defease a New York State bond interest in the Chrysler Building in accordance with the lender’s requirements for the financing, for working capital and for its general charitable purposes.

*No previous applications have been made to this or any other court for the*  
WHEREFORE, the Petitioner respectfully prays that this Court: *Relief Sought*  
*HEREIN*

(a) Permit the Petitioner to use the Chrysler Building as security for up to \$175 million of financing;

(b) Allow the Petitioner to use the proceeds of such financing, in excess of the historic dollar value of the property of \$600,000, for the construction and related costs

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of a new academic building, for renovations to its Foundation Building, to divest endowment funds invested in the ground lease in the Chrysler Building, to defease a New York State bond interest in the Chrysler Building, for general working capital and/or for its other charitable purposes;

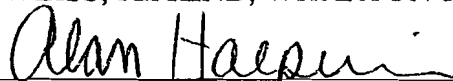
(c) Direct the Petitioner to place \$600,000 from the proceeds of the financing, representing the historic dollar value of the property, in an endowment fund account; and,

(d) Grant such other and further relief as it deems proper.

Dated: New York, New York  
September 6, 2006

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

By: \_\_\_\_\_



Alan S. Halperin  
Maria T. Vullo

1285 Avenue of the Americas  
New York, New York 10019-6064  
(212) 373-3000

Attorneys for Petitioner The Cooper Union for the  
Advancement of Science and Art

# VERIFICATION

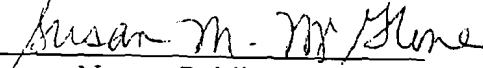
State of New York )  
: ss.:  
County of New York )

GEORGE CAMPBELL, JR., being duly sworn, deposes and says:

I am the President of The Cooper Union for the Advancement of Science and Art, the Petitioner in this proceeding. I have read the foregoing Petition and know its contents to be true to my knowledge except as to the matters alleged on information and belief and as to those matters I believe them to be true.

  
George Campbell, Jr.

Sworn to before me  
this 6 day of September, 2006

  
Notary Public

SUSAN M. MCGLONE  
Notary Public, State of New York  
No. 314854903  
Qualified in New York County  
Commission Expires March 24, 2009

5  
-MM  
-DM  
-FORM  
-MV  
-PL  
-EN  
-ASB  
-BI  
-OTN  
-OT  
-ART75  
-ART77  
-ART78  
-ELEC  
-GUARD81  
-MHYG

HL Art. 81)  
ne

09340000130

Exhibit K

# SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: KIBBIE F. PAYNE  
*Justice*

PART 4

In the Matter of the Application of

THE COOPER UNION  
FOR THE ADVANCEMENT OF SCIENCE AND ART,

Petitioner.

INDEX NO. 112519/06

MOTION DATE 8/13/06

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

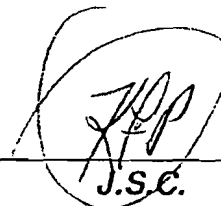
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion: ☐ Yes ☒ No

On March 3, 1902, Edward Copper and Abram S. Hewitt, as trustees, and Edward Copper and Sarah Amelia Hewitt, individually, conveyed the premises known as 405 Lexington Avenue, New York, New York, now the Chrysler building, to petitioner, a not-for-profit institution of higher education. The conveyance was intended to be "an endowment to [petitioner] for its uses, intents and purposes. . . ." Petitioner now moves, by order to show cause, for an order permitting it to deviate from a literal compliance with the terms of the disposition (see Estates, Powers and Trusts Law § 8-1.1 [c] [1]; see also N-PCL § 102 [a] [13]). Specifically, petitioner seeks to mortgage the property, place \$600,000 of the mortgage proceeds in an endowment fund, representing the property's historic value, and use the remaining proceeds to modernize its facilities and address threats to the institution's accreditation. The Attorney General of the State of New York, Charities Bureau, which represents the beneficiaries of the endowment (see EPTL § 8-1.1 [f]), submits an Affidavit of No Objection. The Charities Bureau provides therein that it is "satisfied that [petitioner's application meets] the requirements of EPTL § 8-1.1 (c) and the doctrine of *cy pres*." The Office expressly has no objection to the entry of petitioner's proposed order, granting it use of the subject property as security for financing in the amount of \$175,000,000, and directing it to place \$600,000 from the proceeds of such financing in the endowment fund. Accordingly, the court will grant this petition as indicated in the memorandum attached.

Dated: September 27, 2006

  
J.F.P.  
J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):



At the IAS Part 4 of the  
Supreme Court of the State of  
New York, held in and for  
the County of New York, at  
the Courthouse thereof, 80  
Centre Street, on the \_\_\_ day  
of September, 2006

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

\_\_\_\_\_ X  
:  
:  
In the Matter of the Application of  
:  
:

THE COOPER UNION  
FOR THE ADVANCEMENT OF SCIENCE AND ART :  
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X

ORDER

Index No. 112519/06

The Cooper Union for the Advancement of Science and Art, having  
petitioned this Court for an Order for Cy Pres Relief pursuant to New York Estates,  
Powers and Trusts Law § 8-1.1(c),

AND, an Order to Show Cause having been issued by this Court on  
September 4, 2006,

AND, the Attorney General of the State of New York having been duly  
served with all the papers submitted herein,

AND, the Attorney General of State of New York having duly considered  
the application and having submitted an affidavit confirming that it does not oppose the  
relief requested,

AND, the Petition having come before this Court, and the Court having  
considered the papers submitted therewith,

\_\_\_\_\_

AND, a hearing having been held on this matter on \_\_\_\_\_,  
2006, it is

ORDERED, pursuant to New York Estates, Powers and Trusts Law § 8-  
1.1, that:

1. The Petition is hereby granted in its entirety;
2. The Petitioner is permitted to use the property conveyed by deed dated March 3, 1902 as security for up to \$175 million of financing;
3. Pursuant to § 8-1.1(c) of the New York Estates, Powers and Trusts Law, the restrictions imposed by law on the property due to its status as endowment property are released to such an extent as to allow the Petitioner to use the proceeds of such financing in excess of the historic dollar value of the property of \$600,000 for the construction and related costs of a new academic building, for renovations to its Foundation Building, to divest funds invested in the ground lease in the Chrysler Building, to defease the Dormitory Authority of the State of New York's interest in the Chrysler Building in accordance with the lender's requirements for the financing, for general working capital, and/or for its other charitable purposes; and,
4. The Petitioner is directed to place \$600,000 from the proceeds of the financing, representing the historic dollar value of the property, in an endowment fund account.

September 27, 2006

ENTER

  
\_\_\_\_\_  
J.S.C.

Index No.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

---

In the Matter of the Application of  
NEW YORK CITY OPERA, INC.,

Petitioner,

For cy pres relief pursuant to Section 8-1.1(c) of the  
Estates, Powers and Trusts Law of the State of New  
York.

---

SUPPLEMENTAL AFFIDAVIT OF ANDREW D. SCHAU

---

**Patterson Belknap Webb & Tyler LLP**  
Attorneys for Petitioner

1133 Avenue of the Americas  
New York, New York 10036-6710  
Telephone: (212) 336-2000

**REQUEST FOR JUDICIAL INTERVENTION**

Supreme COURT	New York COUNTY	INDEX NO.	DATE PURCHASED	For Clerk Only
In the matter of the Application of NEW YORK CITY OPERA, INC.,				
Petitioner,				
For cy pres relief pursuant to Section 8-1.1(c) of the Estates, Powers and Trusts law of the State of New York				Judge Assigned
				RJI Date

Date issued joined: \_\_\_\_\_ Bill of particulars served (Y/N): ☐ Yes ☐ No

**NATURE OF JUDICIAL INTERVENTION (check ONE box only AND enter information)**

- |   |   |
|---|---|
| <input type="checkbox"/> Request for preliminary conference   | <input type="checkbox"/> Notice of petition (return date: _____)<br>Relief sought: _____    |
| <input type="checkbox"/> Note of issue and/or certificate of readiness  | <input type="checkbox"/> Notice of medical or dental malpractice action<br>(specify: _____) |
| <input type="checkbox"/> Notice of motion (return date: _____)<br>Relief sought: _____                                      | <input type="checkbox"/> Statement of net worth   |
| <input checked="" type="checkbox"/> Order to show cause<br>(clerk enter return date: _____)<br>Relief sought <u>cy pres</u> | <input type="checkbox"/> Writ of habeas corpus  |
| <input type="checkbox"/> Other ex parte application (specify: _____)  | <input type="checkbox"/> Other (specify: _____)   |

**NATURE OF ACTION OR PROCEEDING (Check ONE box only)****MATRIMONIAL**

- ☐ Contested -CM  
☐ Uncontested -UM

**COMMERCIAL**

- ☐ Contract -CONT  
☐ Corporate -CORP  
☐ Insurance (where insurer is a  
party, except arbitration) -INS  
☐ UCC (including sales, negotiable  
instruments) -UCC  
☐ \*Other Commercial -OC

**REAL PROPERTY**

- ☐ Tax Certiorari -TAX  
☐ Foreclosure -FOR  
☐ Condemnation -COND  
☐ Landlord/Tenant -LT  
☐ \*Other Real Property -ORP

**OTHER MATTERS**

- ☒ \* cy pres -OTH

**TORTS****Malpractice**

- ☐ Medical/Podiatric -MM  
☐ Dental -DM  
☐ \*Other Professional -OPM

- ☐ Motor Vehicle -MV  
☐ \*Products Liability -PL

- ☐ Environmental -EN  
☐ Asbestos -ASB  
☐ Breast Implant -BI  
☐ \*Other Negligence -OTN

- ☐ \*Other Tort (including  
intentional) -OT

**SPECIAL PROCEEDINGS**

- ☐ Art. 75 (Arbitration) -ART75  
☐ Art. 77 (Trusts) -ART77  
☐ Art. 78 -ART78  
☐ Election Law -ELEC  
☐ Guardianship (MHL Art. 81) -GUARD81  
☐ \*Other Mental Hygiene -MHYG  
☐ \*Other Special Proceeding -OSP

Check "YES" or "NO" for each of the following questions:

1. This action/proceeding against:

YES NO

☐ ☒ [X] [ ]

YES NO

☐ ☐ [ ] [ ]

YES NO

☒ [X] [ ] Does this action/proceeding seek equitable relief?

☐ [ ] [ ] Does this action/proceeding seek recovery for personal injury?

☐ [ ] [ ] Does this action/proceeding seek recovery for property damage?

**Pre-Note Time Frames:**

(This applies to all cases except contested matrimonials and tax certiorari cases)

Estimated time period for case to be ready for trial (from filing of RJI to filing of Note of Issue):

☒ Expedited: 0-8 months

☐ Standard: 9-12 months

☐ Complex: 13-15 months

**Contested Matrimonial Cases Only:** (Check and give date)

Has summons been served?

☐ No

☐ Yes, Date: \_\_\_\_\_

Was a Notice of No Necessity filed?

☐ No

☐ Yes, Date: \_\_\_\_\_

**ATTORNEY(S) FOR PETITIONER(S):**

<u>Self Rep.*</u>	<u>Name</u>	<u>Address</u>	<u>Phone #</u>
<input type="checkbox"/>	John P. Sare	1133 Avenue of the Americas New York, New York 10036	(212) 336-2000
<input type="checkbox"/>	Andrew D. Schau	1133 Avenue of the Americas New York, New York 10036	(212) 336-2546

**ATTORNEY(S) FOR RESPONDENT(S):**

<u>Self Rep.*</u>	<u>Name</u>	<u>Address</u>	<u>Phone #</u>
<input type="checkbox"/>			
<input type="checkbox"/>			

\*Self-Represented: parties representing themselves, without an attorney, should check the "Self Rep." box and enter their name, address, and phone # in the space provided above for attorneys.

**INSURANCE CARRIERS:**

N/A

**RELATED CASES: (if NONE, write "NONE" below)**

Title Index # Court Nature of Relationship

I AFFIRM UNDER PENALTY OF PERJURY THAT, TO MY KNOWLEDGE, OTHER THAN AS NOTED ABOVE, THERE ARE AND HAVE BEEN NO RELATED ACTIONS OR PROCEEDINGS, NOR HAS A REQUEST FOR JUDICIAL INTERVENTION PREVIOUSLY BEEN FILED IN THIS ACTION OR PROCEEDING.

Dated: April 9, 2009

(SIGNATURE)

Andrew D. Schau

ATTORNEY FOR New York City Opera, Inc.

SUPREME COURT OF THE STATE OF NEW YORK,  
COUNTY OF NEW YORK

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In the Matter of the Application of	:
NEW YORK CITY OPERA, INC.,	:
	:
Petitioner,	:
	:
For cy pres relief pursuant to Section 8-1.1(c) of the	:
Estates, Powers and Trusts Law of the State of	:
New York.	:
-----X	

[PROPOSED] ORDER

Index No.

Upon the annexed Petition for Cy Pres Relief Pursuant to Section 8-1.1(c) of the New York Estates, Powers and Trusts Law (the "Petition"), the Affidavit of Andrew D. Schau in Support of Application for Emergency Relief dated April 9, 2009, the Supplemental Affidavit of Andrew D. Schau dated April 9, 2009, and the exhibits annexed thereto, the Affidavit of Michael M. Kaiser dated March 31, 2009, and the accompanying Memorandum of Law, and sufficient cause appearing therefor; and

WHEREAS, the Attorney General of the State of New York, in his capacity as the representative of the ultimate charitable beneficiaries of a not-for-profit corporation operating in or under the laws of the State of New York, is a necessary statutory party;

WHEREAS, the Attorney General has provided an Affidavit of No Objection in support of the Prayer for Relief set forth in the Petition, its Affidavit conditioned on certain limitations to be set forth in the Order herein; and

WHEREAS, there are no persons interested in this proceeding other than Petitioner and the Attorney General, IT IS HEREBY

ORDERED that Petitioner is entitled to cy pres relief pursuant to Section 8-1.1(c) of the New York Estates, Powers and Trusts Law with respect to its petition regarding the

endowment fund held pursuant to an Agreement effective as of April 30, 2001 by and among the Lila Acheson and DeWitt Wallace Fund for Lincoln Center and City Opera, City Ballet, the Met, the Chamber Music Society of Lincoln Center, Inc., the Vivian Beaumont Theater, Inc., and the Philharmonic-Symphony Society of New York, Inc (such fund hereinafter, the “Wallace Fund”), as follows:

(a) Petitioner may borrow from the Wallace Fund (in addition to those amounts which Petitioner may expend pursuant to the terms of the Wallace Agreement and applicable law and the amounts it may borrow pursuant to the Order of this Court dated October 28, 2008) up to \$6,600,000 in order to fund its cash-flow needs during its 2008-2009 fiscal year and its 2009-2010 fiscal year.

(b) In addition to fulfilling its obligations under the October 28, 2008 Order, Petitioner shall restore to the Wallace Fund the net amounts borrowed from it pursuant to paragraph (a) as Petitioner has net financial resources that may be prudently used for that purpose consistent with the legal restrictions on the use of such resources.

(c) Petitioner shall submit a written annual report to the Attorney General of the State of New York (the “Attorney General”) within six months after the close of each fiscal year of Petitioner ending on or after June 30, 2009 concerning the extent, if any, to which Petitioner, whether through contributions, accumulation of income, or capital appreciation, has during such fiscal year restored the value of the Wallace Fund as required by this Order and the Order of this Court dated October 28, 2008, such obligation to continue until such time as Petitioner can report that it has restored the amounts required by paragraph (b) and the October 28, 2008 Order.

(d) Petitioner's senior management shall provide to the Board of Directors or the Executive Committee of the Board of Directors a written report, not less often than once a month, concerning variances from the budget for the 2009-2010 fiscal year as such budget is in effect (and approved by the Board of Directors or the Executive Committee) from time to time.

(e) Petitioner's senior management shall provide to the Board of Directors or the Executive Committee of the Board of Directors, not less often than once every two weeks, an updated written cash-flow projection for the balance of the 2008-2009 fiscal year and for the 2009-2010 fiscal year.

(f) Petitioner for the balance of the 2008-2009 fiscal year and for the 2009-2010 fiscal year shall report periodically, but in no event less frequently than once a month, to an independent financial advisor concerning the strategic plan and financial plan that was previously developed in consultation with independent financial advisor Michael M. Kaiser, for the purpose of reviewing budget variances with the advisor, obtaining the advisor's assessment of the continued viability of such strategic plan and financial plan, and identifying alternative courses of action as warranted. The advisor retained for such purpose may continue to be Michael M. Kaiser or, alternatively, shall be another individual selected by Petitioner and approved by the Attorney General (such approval not to be unreasonably withheld).

(g) Petitioner's Board of Directors shall continue the on-going evaluation of the effectiveness of Petitioner's governance, financial and risk management, investment management policies practices, and systems of internal controls and, following consultation with the Attorney General, adopt appropriate enhancements thereto.



(h) Petitioner shall designate or retain a qualified individual to perform the roles and functions of chief financial officer.

(i) Petitioner for the balance of the 2008-2009 fiscal year and for the 2009-2010 fiscal year shall report periodically, but not less often than once per calendar quarter, to the Attorney General concerning its compliance with the terms of this Order and its projections concerning its anticipated ability to restore amounts to the Wallace Fund in accordance with this Order and the Order of this Court dated October 28, 2008.

Dated: April \_\_\_\_, 2009

E N T E R:

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J.S.C.

Index No.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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In the Matter of the Application of  
NEW YORK CITY OPERA, INC.,

Petitioner,

For cy pres relief pursuant to Section 8-1.1(c) of the  
Estates, Powers and Trusts Law of the State of New  
York.

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[PROPOSED] ORDER

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**Patterson Belknap Webb & Tyler LLP**  
Attorneys for Petitioner

1133 Avenue of the Americas  
New York, New York 10036-6710  
Telephone: (212) 336-2000

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
In the Matter of the Application of :  
NEW YORK CITY OPERA, INC., :

Petitioner, :

PETITION

For cy pres relief pursuant to Section 8-1.1(c) of the :  
Estates, Powers and Trusts Law of the State of :  
New York :

File No.:

-----X

New York City Opera, Inc., by its counsel Patterson Belknap Webb & Tyler LLP,  
respectfully alleges as follows:

**Nature of the Action**

1. This is an application for cy pres relief pursuant to Section 8-1.1(c) of the New York Estates, Powers and Trusts Law (“EPTL”) for an order releasing New York City Opera, Inc. (“City Opera” or “Petitioner”) from the restrictions on an endowment fund (the Wallace Fund, as hereinafter defined) to the extent that will enable City Opera to borrow an additional \$6,600,000 from the Wallace Fund in order to fund its cash-flow needs during its current 2008-2009 fiscal year (ending June 30, 2009) and its 2009-2010 fiscal year (ending June 30, 2010).

2. This relief is requested in order to enable City Opera to weather a financially challenging period during which it has been deprived of ticket revenues, due to the months-long renovation of its Lincoln Center home in the David H. Koch Theater (the “Koch Theater”), and faced an array of other financial challenges, including high fixed costs, investment losses occasioned by the worldwide economic downturn, and a change in its

leadership and programming strategy. Both the current fiscal year and the next fiscal year represent a pivotal period of change for City Opera, one which has not only presented significant challenges but will also reposition City Opera in a newly renovated home with a refocused artistic mission. City Opera believes that, if the requested relief is granted, it will be able to lay a strong foundation for its fiscal and artistic future and return to a “steady state” of financial strength and well-being.

3. This request for relief supplements an earlier request, which this Court granted in an order issued on October 28, 2008 (the “Oct. 28, 2008 Order” or the “Order”), seeking a modification of the restrictions of the Wallace Fund to permit Petitioner to borrow \$17,520,000 of the Wallace Fund to pay down Petitioner’s debt (left over from its 2007-2008 fiscal year) and meet its immediate cash-flow needs. *See* Oct. 28, 2008 Order by the Hon. James A. Yates, attached as Exhibit A to the Supplemental Affidavit of Andrew D. Schau, dated April 9, 2009 (the “Schau Affidavit” or “Schau Aff.”). The Attorney General of the State of New York (the “Attorney General”), on behalf of the ultimate charitable beneficiaries, provided an Affidavit of No Objection in connection with Petitioner’s earlier request.

4. A supplemental request was contemplated at the time of Petitioner’s earlier request and is now made in this Petition. In the intervening period, Petitioner has had the opportunity (as required by the Order) to further develop a financial plan, in consultation with an independent financial advisor approved by the Attorney General, and to present the plan to the Attorney General. City Opera, in consultation with its independent financial advisor, Michael M. Kaiser, the President of the John F. Kennedy Center for the Performing Arts, Inc., in Washington, D.C., has now developed a strategic and financial plan and submitted it to the Attorney General. Having reviewed the plan (described *infra* in ¶¶ 41-53) and this Petition, the

City Opera itself, as a vital and unique institution and a constituent part of the Lincoln Center campus – is not frustrated. Because the requested relief is structured as a borrowing, and as such contemplates eventual replenishment of the Wallace Fund, the requested relief also supports the intention that the Wallace Fund be an endowment fund, capable of supporting and sustaining City Opera for generations to come.

### **The Parties**

9. City Opera is a constituent part of Lincoln Center and is exempt from federal income as an organization described in § 501(c)(3) of the Internal Revenue Code. Organized in and under the laws of the State of New York, City Opera is a Type B not-for-profit corporation, which is a type of corporation formed for charitable, educational, religious, scientific, literary, or cultural purposes or the prevention of cruelty to children or animals. *See* N.Y. Not-for-Profit Corporation Law Section 201(b).

10. The Attorney General of the State of New York, in his capacity as the representative of the ultimate charitable beneficiaries of a not-for-profit corporation operating in or under the laws of the State of New York, is a necessary statutory party. EPTL § 8-1.1(f). As noted above, the Attorney General has supplied an Affidavit of No Objection to the relief requested in this Petition.

### **Jurisdiction and Venue**

11. This Court has jurisdiction over this proceeding because the parties are located or have offices within the County and State of New York and because the matter concerns the administration of charitable assets within the Court's jurisdiction.

## Factual Allegations

### Background

#### Background of City Opera

12. City Opera was founded in 1943 with a mission to provide financially accessible performances to a wide audience and to provide opera that reflects the company's commitment to excellence, innovative repertory choices and the development of American opera. Originally a division of City Center for Music and Drama, Inc. ("CCMD"), City Opera was incorporated as a separate entity in 1978.

13. City Opera has secured its status as a cultural and educational linchpin of New York City through arts and education programs that are numerous, longstanding and highly regarded.

14. City Opera's Board of Directors consists of 37 voting members, drawn from the business, arts and philanthropic communities in New York City, who serve on a voluntary basis. Additionally, both the Mayor of the City of New York and the Commissioner of Cultural Affairs of the City of New York serve *ex officio* on City Opera's Board of Directors. Representatives of the Mayor and the Commissioner attend Board meetings of City Opera.

#### The Transition Period

15. City Opera is a matter of months away from being part of a revitalized Lincoln Center campus, now undergoing a \$1 billion redevelopment that is slated for completion in 2010 and is expected to make Lincoln Center an even greater draw than it already is for audiences from throughout the region and the world.

16. City Opera is also months away from reaping the benefits of a newly renovated opera house. City Opera was and is, along with New York City Ballet, Inc. ("City

Ballet”), an “anchor company” of the Koch Theater at Lincoln Center. The Koch Theater is owned by New York City, which leases it to Lincoln Center, which in turn subleases it to CCMD. The Koch Theater is made available to City Opera and City Ballet under a long-term contractual relationship with CCMD in which City Opera and City Ballet are required to cover virtually all the costs associated with operating and maintaining the theater.

17. It has long been a goal for City Opera to renovate the theater (formerly known as the “New York State Theater”) in order to modernize the house and rectify perceived acoustical shortcomings. In July 2008, the substantial commitment made by philanthropist David H. Koch to CCMD, along with other funding, made this renovation possible.

18. The renovations will upgrade the Koch Theater to the high-quality facility City Opera has long needed, but they have prevented City Opera from performing in the theater during its current 2008-2009 season. With only six major New York performances scheduled this season (all of them at venues other than the Koch Theater), City Opera expects to earn less than \$320,000 from ticket sales this season, a vast decline from its usual figures (more than \$13 million in the 2005-2006 and 2006-2007 seasons, nearly \$12 million during 2007-2008). The loss this season of City Opera’s home in the Koch Theater has had and continues to have a profound impact on City Opera’s finances.

19. Moreover, this season’s lost revenue follows a period in which City Opera’s finances were already strained. Since the terrorist attacks on New York City on September 11, 2001, City Opera has struggled to respond to the various challenges of lowered attendance at cultural events and reduced donations, as well as long-term changes in tastes and ticket-buying preferences. During the same period, by contrast, City Opera has seen escalating fixed costs related to theater operations and labor, including union contracts – a not-insignificant

burden considering that City Opera employs hundreds of people on a full- and part-time basis. The presence of these fixed costs also meant that, when faced with this season's lost ticket revenue, City Opera could not mitigate the loss with a reduction in costs.

20. At the end of the 2006-2007 season, in an effort to build attendance, attract new philanthropic support, and surmount these financial hurdles, City Opera engaged Gerard Mortier as General Manager and Artistic Director and asked him to revitalize City Opera's programming beginning with the 2009-2010 season, and Mr. Mortier developed a concept of large-scale transformation expected to catapult City Opera to a strong financial position and restore City Opera to operating surpluses. However, in the spring and summer of 2008, just as Mr. Mortier's planning for the 2009-2010 season began to take shape, world financial markets began to deteriorate, and by the fall of 2008, those markets were experiencing unprecedented turmoil and steep declines. Thus, by the fall of 2008, City Opera faced a pair of daunting challenges: a darkened theater (with its adverse effect on ticket revenues) and a worldwide financial crisis (with the accompanying damage to the value of City Opera's endowment).<sup>1</sup>

21. This was the context in which City Opera made its first application for cy pres relief with respect to the Wallace Fund. In that proceeding, City Opera secured this Court's permission to borrow \$9,500,000 from the Wallace Fund to pay down indebtedness carried forward from the financially disappointing 2007-2008 season and \$8,020,000 to meet City Opera's immediate cash-flow needs. (The terms of the Court's Order and City Opera's compliance with the Order are described in greater detail *infra*.) That relief has enabled City

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<sup>1</sup> In response to rapidly deteriorating financial markets and its own projected financial needs, City Opera decided in October 2008 to move all its investments to cash in order to insulate itself from further market deterioration.



Opera to meet its financial obligations since October 2008, but it is not sufficient to enable City Opera to complete the current fiscal year (which ends on June 30, 2009) or commence the next fiscal year in a sustainable financial position.

22. Significantly, the world financial situation continued to deteriorate after the Oct. 28, 2008 Order. The changing global economy led the Board to reevaluate the feasibility of achieving Mr. Mortier's vision, which would have required an annual budget of \$60 million (nearly twice City Opera's customary budget), and to conclude that such a budget was no longer sustainable. Even though City Opera had dedicated itself in 2007 to a financial model based on the compelling vision of its new leader and had pursued that strategy for much of 2008, it was becoming clear as the year drew to a close that the rapid growth required by his vision was not sustainable and that transformation would have to take some other form. Accordingly, it was announced in November 2008 that Mr. Mortier would step down, that a new (and leaner) financial model would be developed, and that a new leader would be chosen and given a mandate to present an artistically exciting season within substantially reduced financial parameters. Those new financial parameters, and the accompanying strategic plan for City Opera, are described *infra*. On March 12, 2009, the Board adopted a resolution authorizing the submission of this Petition. See President's Certificate, attached as Exhibit B, Schau Aff.

### **The Wallace Fund**

#### **The Wallace Philanthropies**

23. Lila Acheson and DeWitt Wallace, the founders of Reader's Digest, were enthusiastic patrons of the arts, culture and education in New York City. Two foundations that they created, the Lila Wallace-Reader's Digest Fund and the DeWitt Wallace-Reader's Digest Fund (the "LW and DW Funds"), made multi-million-dollar grants to a series of smaller

organizations designed to provide support for a number of New York institutions, including Lincoln Center. In 1982 the Lila Acheson and DeWitt Wallace Fund for Lincoln Center (“WFLC”), a Type B New York not-for-profit corporation, was recognized as a tax-exempt supporting organization of City Opera and other Lincoln Center constituents.

24. Under WFLC’s Certificate of Incorporation, its purpose was very broad: it was “exclusively for the benefit of the constituent companies of Lincoln Center.” *See* Exhibit C, Schau Aff. Those companies (hereinafter, the “WFLC Recipients”) are City Opera, City Ballet, the Metropolitan Opera Association, Inc., the Chamber Music Society of Lincoln Center, Inc., the Vivian Beaumont Theater, Inc. (now Lincoln Center Theater, Inc.), and the Philharmonic-Symphony Society of New York, Inc. (commonly known as the New York Philharmonic).

#### The WFLC Agreements

25. Under a series of agreements (the “WFLC Agreements”), the LW and DW Funds and another fund called the Lakeview Fund, Inc. absolutely and irrevocably transferred large blocks of Reader’s Digest Association, Inc. (“Reader’s Digest”) stock to WFLC. Each agreement recited that “DeWitt Wallace ... and Lila Wallace have long supported the various companies associated with Lincoln Center.” Exhibit D, Schau Aff. The WFLC Agreements expressed the wish (but not the requirement) that the income from the donated property be divided into 48 parts and allocated pursuant to a formula among City Opera and the other constituents, to support new works or performances (by implication excluding capital expenditures and general operational overhead). The City Opera share was nine parts out of 48.

26. Under the terms of the agreements, the LW and DW Funds gave the WFLC the power to vary the allocation specified in the WFLC Agreements and, impliedly, the

power even to exclude any one or more of the WFLC Recipients (though City Opera's share was in fact never altered from the 9/48 share specified). The WFLC Agreements are silent about WFLC's power to expend amounts other than income and make no reference to the assets being held as an "endowment." WFLC therefore had an implied power to distribute or spend all of the assets if it so chose. Significantly, then, the assets held by WFLC were not given to it as an endowment.

27. Eventually, WFLC determined that it would be appropriate to distribute its remaining assets, wind up its affairs and dissolve. The move was designed in part to enable the intended charitable beneficiaries (e.g., City Opera) to act independently in deciding whether and to what extent the retention of the Reader's Digest stock continued to be appropriate or desirable.

28. Effective as of April 30, 2001, WFLC entered into an agreement (the "Wallace Agreement") with City Opera and the other WFLC Recipients. Exhibit E, *Schau Aff.* WFLC subsequently distributed all of its remaining assets to the WFLC Recipients, in shares corresponding to those specified in the WFLC Agreements (e.g., 9/48ths to City Opera), and on December 18, 2001, WFLC dissolved, with the approval of the New York County Supreme Court. *See Schau Aff.*, Exhibit C.

#### The Wallace Agreement

29. The Wallace Agreement recites, among other things, that WFLC's assets had grown from approximately \$34 million to more than \$359 million and that WFLC had authorized grants of approximately \$186 million to the WFLC Recipients to support "new works, or new productions or new performances or to underwrite touring of new productions or repertory, or to support educational or audience outreach programs."

30. The Wallace Agreement further recites that "over the past 18 years" the

WFLC Recipients “have demonstrated appropriate sensitivity and commitment to the interests of Lila Acheson and DeWitt Wallace” and that each of them “is institutionally strong and capable of directly managing the assets that are proposed to be transferred to it upon the dissolution” of WFLC.

31. Under the Wallace Agreement, no charity is granted any supervisory or oversight role with respect to the administration of the Wallace Fund, nor does the Wallace Agreement contain any reversionary interest or “gift over” if its terms cannot be fulfilled.

32. The Wallace Agreement has four primary aspects (applicable to each WFLC Recipient with respect to its own Wallace Fund, but described here only with reference to City Opera):

(a) City Opera must maintain the Wallace Fund “in perpetuity as an endowment fund to be known as the Lila Acheson and DeWitt Wallace Endowment Fund” (i.e., the fund referred to in this petition as the “Wallace Fund”). Paragraph B, Wallace Agreement.

(b) “The annual spending from the [Wallace Fund] shall be determined by [City Opera.]” In making this determination concerning annual spending, which is referred to as the “Annual Contribution,” City Opera agrees to “apply a spending policy, as approved by [its Board], to the [Wallace Fund] in no greater percentage and in the same manner as such spending policy is applied to [its] other endowment funds.”

However, application of the spending policy may reduce the value of the Wallace Fund to an amount below its “Original Fair Market Value ... in which case the [City Opera] shall have *no obligation to restore* the [Wallace Fund] to such Original Fair Market Value” (emphasis added). Paragraph C, Wallace Agreement.

(c) Annual Contributions drawn from the Wallace Fund must be used to support “new works or new productions or new performances, or to underwrite touring of new productions or repertory, or to support educational or audience outreach programs.” If those priority needs are met, City Opera may also use the Annual Contribution “for other priority needs” (e.g., capital expenditures, security, ushers, and maintenance). Paragraph E, Wallace Agreement.

(d) In certain special circumstances, City Opera is also permitted to draw down amounts known as “Special Contributions.” Special Contributions may be made only for “Special Projects” (a term defined to include only new works, new productions or new performances; touring of new productions or repertory; and educational or audience outreach programs), only on approval of two-thirds of the full Board upon a determination that an “extraordinary need” exists that cannot be readily satisfied out of other resources available to City Opera, and only if there are other resources that can be applied toward the Special Project which are in the aggregate equal to at least twice the amount to be applied from the Wallace Fund. Special Contributions may not reduce the value of the endowment below 80% of its Original Fair Market Value, and the aggregate of Special Contributions may not exceed 20% of the fair market value of the Wallace Fund on the date when the Board approves the withdrawal. Paragraph D, Wallace Agreement.

33. Under New York law, the amount known as the “historic dollar value” of an endowment, which is broadly speaking the amount of contributions to the endowment, may

not be expended without judicial approval where a donor is unavailable to give permission.<sup>2</sup> N-PCL § 513(c). By contrast, the appreciation in excess of the historic dollar value of an endowment fund is available for expenditure, absent an express limitation by the donor. As the above-cited provisions of the Wallace Agreement illustrate, the Wallace Fund is more flexible than a traditional endowment because the Wallace Agreement contains two provisions expressly contemplating expenditures that dip into the Wallace Fund’s “Original Fair Market Value” (a term that functions within the Wallace Agreement as the equivalent of the statutory term “historic dollar value”).

34. When the Wallace Agreement took effect, in April 2001, City Opera was operating at a surplus and was nearing the end of an eighth consecutive season of financial stability. Neither WFLC nor City Opera could have foreseen the many things that then happened: the terrorist attacks of September 11, 2001, the economic downturn which hit New York City, and systemic changes in tastes and ticket-buying preferences in New York – all of which significantly slowed ticket sales and adversely affected donations. Neither WFLC nor City Opera could have predicted the extent to which escalation of fixed costs related to labor generally and union contracts in particular would increasingly burden City Opera’s finances. Neither WFLC nor City Opera could have predicted that City Opera’s home in the New York Koch Theater would be closed for renovations throughout the 2008-2009 season and for a portion of the 2009-2010 season, thereby depleting ticket revenues and hampering fundraising. Finally, neither WFLC nor City Opera could have predicted that, beginning in September 2008,

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<sup>2</sup> The “historic dollar value” of an endowment fund is the “aggregate fair market value in dollars of (i) an endowment fund at the time it became an endowment fund, (ii) each subsequent donation to the fund at the time it was made, and (iii) each accumulation made pursuant to a direction in the applicable gift instrument at the time the accumulation is added to the fund. The determination of historic dollar value made in good faith by the corporation is conclusive.” N-PCL § 103(a)(16).

at a pivotal point in City Opera's history, world financial markets would experience unprecedented turbulence and experience declines that have shrunk the value of its investments and dampened prospects for donors.

35. As of October 10, 2008, which was shortly before Petitioner filed its first Petition with the Court, the value of the Wallace Fund stood at \$27,076,687, as against a starting value of \$51,571,025 in 2001. At that time, the Wallace Fund represented approximately 80% of City Opera's endowment, whose other funds were insufficient to meet City Opera's needs and were subject (and continue to be subject) to donor-imposed restrictions preventing withdrawal of those funds (except in some cases on an interim basis). Due to the limitations imposed by the Special Contributions provision of the Wallace Agreement, City Opera was at the time (and still is) barred from drawing further Special Contributions from the Wallace Fund. With only the Annual Contribution available to City Opera, it could draw from the Wallace Fund only to the limited extent of its current endowment spending policy, or 5.5% per year. That was (and still is) simply not enough for Petitioner to meet its operating needs.

**Oct. 28, 2008 Order and City Opera's Compliance with the Order**

36. On October 28, 2008, the Court granted cy pres relief and issued the Order permitting City Opera to borrow \$17,520,000 from the Wallace Fund, of which \$9,500,000 was to pay down Petitioner's indebtedness and \$8,020,000 was to fund cash-flow needs. *See* Exhibit A, Schau Aff. As of February 28, 2009, the Wallace Fund, having been debited by some of the borrowings permitted by the Oct. 28, 2008 Order, had an estimated value of \$12,432,447. Of the \$8,020,000 in borrowing capacity authorized for 2008-2009 under the Oct. 28, 2008 Order, \$2,620,785 of borrowing capacity remained as of February 28, 2009, all of which is expected to be drawn down on or about April 8, 2009.

37. The Order imposed a variety of conditions on City Opera's withdrawals from the Wallace Fund. Additionally, the Order obligated City Opera to restore to the Wallace Fund the net amounts borrowed, and to restore the Wallace Fund to at least eighty percent of its historic dollar value, to the extent City Opera has net financial resources that may prudently be used for that purpose consistent with the legal restrictions on the use of such resources. The Order also required City Opera to take specific steps pertaining to management and planning: (a) development of a viable financial plan, in consultation with an independent financial advisor, to be retained subject to the approval of the Attorney General; (b) evaluation by the Board of Directors of the effectiveness of City Opera's governance, financial and risk management, investment management policies, and systems of internal controls and, following consultation with the Attorney General, adoption of appropriate enhancements to these systems and practices; and (c) designation or retention of qualified individuals or firms to perform the roles and functions of chief executive, internal auditor, and chief financial officer.

38. In accordance with the Order, City Opera borrowed \$9,479,214.94 from the Wallace Fund on or about October 30, 2008 and used those funds for the purpose stipulated in the Order (i.e., to pay down indebtedness (including interest) incurred in respect of the 2007-2008 fiscal year). Between the date of the Order and February 28, 2009, City Opera borrowed an additional \$5,420,000 from the Wallace Fund in order to fund cash-flow needs through that date. City Opera anticipates expending the remainder of the \$8,020,000 in current borrowing capacity on or about April 8, 2009. Accordingly, it is critical to City Opera that the relief sought in this Petition be granted expeditiously.

39. Notably, despite the challenging economic climate, City Opera's donors have rallied to help the struggling organization; as a result, donations in the final quarter of



calendar 2008 exceeded cash-flow projections, and City Opera projects that individual giving will remain consistent with 2007-2008. That show of donor support, together with careful cash-flow management and cost savings occasioned by the decision not to pursue Mr. Mortier's plans, have enabled City Opera to improve its cash-flow situation and draw down the Wallace Fund more slowly than City Opera had originally projected. City Opera's decision last October to switch its investments from equity to cash has also helped City Opera stabilize its finances, even as world markets have continued to deteriorate. Nonetheless, as anticipated, the \$8,020,000 of borrowing permitted by the Order is not sufficient to enable City Opera to reach the end of its current fiscal year or commence its next fiscal year with adequate resources.<sup>3</sup>

40. In accordance with the requirements of the Oct. 28, 2008 Order, City Opera has:

(a) Enlisted Michael M. Kaiser, the President of the John F. Kennedy Center for the Performing Arts, Inc., Washington, D.C., as its independent financial advisor, an appointment that was approved by the Attorney General;<sup>4</sup>

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<sup>3</sup> In order to cover its cash-flow needs during October 2008 and before it obtained this Court's Oct. 28, 2008 Order, City Opera exercised its right to borrow \$1.4 million from one of its other endowment funds, known as the "Air Rights Endowment." The restrictions on the Air Rights Endowment are set forth in an agreement with the City of New York. The governing agreement confers on City Opera the right to borrow from the Air Rights Endowment under certain circumstances, provided that the borrowing is repaid by the end of the fiscal year in which it occurs (i.e., by June 30, 2009). Although City Opera stated in its prior Petition that it would use the borrowing permitted in the Oct. 28, 2008 Order to repay the Air Rights Endowment, doing so out of the cash currently available to City Opera would result in cash-flow disruptions. Following consultation with the City of New York, City Opera has concluded that repayment of the Air Rights Endowment should therefore be deferred until the end of the current fiscal year. Accordingly, it is City Opera's intention, if the relief requested in this Petition is granted, to use a portion of that relief to repay the Air Rights Endowment.

<sup>4</sup> A copy of Mr. Kaiser's resume is attached to the Schau Affidavit as Exhibit F. Mr. Kaiser is famed for his role in turning around the financial and artistic fortunes of several organizations, including the Alvin Ailey Dance Company in New York and the Royal Opera House at Covent Garden in London, England. He is the author of a recent book on this topic, entitled *The Art of the Turn-Around*. Mr. Kaiser has provided these services without compensation from City Opera.

(b) Hired George Steel, the General Director of the Dallas (Texas) Opera, as its new General Manager and Artistic Director;<sup>5</sup>

(c) Engaged in a search process to identify a permanent Chief Financial Officer (“CFO”), with the functions of CFO now being performed on an interim basis by a budget manager who succeeded the prior CFO, who has since taken a new job;<sup>6</sup>

(d) Engaged the law firm Weil Gotshal & Manges LLP to evaluate the effectiveness of City Opera’s governance;<sup>7</sup>

(e) Designated the accounting firm of J.H. Cohn LLP to serve as City Opera’s out-sourced internal auditor; and

(f) Submitted to the Attorney General a financial plan, which included a strategic plan, financial statement information for recent fiscal years and *pro forma* projections for the current fiscal year (2008-2009), the next two fiscal years (2009-2010 and 2010-2011), and a *pro forma* cash-flow statement for 2008-2009.

41. In connection with securing the Attorney General’s Affidavit of No Objection to this Petition, City Opera has since submitted updated versions of the reports described in the preceding paragraph and supplied the Attorney General with a *pro forma* cash-flow statement for the 2009-2010 fiscal year and a set of contingency plans for 2009-2010 cash-flows.

42. City Opera’s financial and strategic plan, its *pro forma* projections for the

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<sup>5</sup> A copy of Mr. Steel’s resume is attached to the Schau Affidavit as Exhibit G.

<sup>6</sup> Mr. Steel has commenced the search for the individual who will serve in this capacity. To help ensure operational efficiency, it is anticipated that the individual will have a broader mandate than finance, perform the functions of both Chief Financial Officer and Chief Operating Officer, and bear the title of Vice President for Finance and Administration.

<sup>7</sup> This project is under way.

current fiscal year, the next two fiscal years, its *pro forma* cash-flow statement for 2008-2009, the updated versions of those reports, a *pro forma* cash-flow statement for the 2009-2010 fiscal year and the set of contingency plans for 2009-2010 cash-flows were prepared by City Opera in consultation with Michael M. Kaiser as the independent financial advisor to City Opera. Mr. Kaiser's Affidavit concerning his work as financial advisor, dated March 31, 2009, is filed herein.

### **City Opera's Strategic Plan**

43. As part of the strategic planning process in which City Opera has engaged since the Oct. 28, 2008 Order, City Opera has determined that, in the current economic environment, it must become a more flexible and somewhat smaller organization in order to be a sustainable cultural enterprise. While plans made in 2006 and early 2007 (before the global economy began to deteriorate) had envisioned institutional transformation through Mr. Mortier's singular vision, necessarily accompanied by a significant escalation of budgets and fundraising, the state of the world economy since September 2008 has forced City Opera to adopt a new and leaner financial strategy. This strategy is predicated on strong, flexible leadership possessed of an undiminished commitment to City Opera's core artistic values: championing new works, reviving significant American operas and 19<sup>th</sup> -20<sup>th</sup> century operas, rediscovering baroque and early classical works, producing visionary productions of the standard repertoire, and launching the careers of talented American singers. City Opera will also continue to provide high-quality performances at reasonable prices and will redouble its efforts to invest in important educational projects, freed of some of the cost pressures it has faced in the past. The attainment of those goals requires specific strategies, which are outlined *infra*.

44. City Opera plans to reduce its annual operating budget to the range of \$30 million to \$35 million annually (down from \$38 million to \$43 million or more in recent

seasons but slightly more than the budget for the transitional year of 2009-2010). Based on its consultations with Mr. Kaiser and a review of the organization's fundraising history and its capacity for ticket sales, City Opera has concluded that \$30 million to \$35 million annual budgets provide parameters that will be reasonable and sustainable for the foreseeable future.

45. By hiring a new top executive, City Opera has already accomplished a core element of its strategic plan. City Opera has directed its new leader, George Steel, to undertake, on an expedited basis, an array of strategic priorities: developing 2009-2010 and 2010-2011 seasons that are within City Opera's new budget limits (see prior paragraph), ensuring that the programming for these seasons creates a distinct identity for City Opera, reconfiguring City Opera's cost structure, implementing a bold new marketing initiative (discussed *infra*), and strengthening City Opera's fundraising (also discussed *infra*).

46. City Opera plans to increase the size and engagement of its Board (e.g., by empowering Board members to participate in strategy development for relevant aspects of operations such as marketing and fundraising). The Nominating and Governance Committee of the Board has been tasked with this responsibility.

47. City Opera plans to launch a new type of marketing effort: institutional marketing. This marketing effort will be aimed at creating awareness of City Opera as an important cultural and educational institution – an institution with a unique and valuable purpose, an institution that deserves to be sustained by the philanthropic community. City Opera has never before had an institutional marketing program, having in the past relied primarily on marketing related to the sale of opera tickets. Obviously, City Opera will continue to market tickets to its performances.

48. City Opera plans to develop special events related to the re-opening of the

Koch Theater. Those events (which will be developed under Mr. Steel's direction) will be designed to heighten the organization's profile, attract curious new audiences, and solidify City Opera's valued relationships with loyal donors and ticket buyers.

49. City Opera plans to increase the visibility of its educational programs. This effort will aid City Opera in the effort to attract donors, including donors who may be willing to support education but may not be willing to support performances or productions.

50. To reduce the size of its operations, City Opera plans to reduce the number of performances it presents each year by approximately 35% – from approximately 115 in prior seasons to only 37 during the transitional 2009-2010 season (when the Koch Theater is not even available for the first two months of the season) to approximately 75 performances in 2010-2011. City Opera views approximately 75 performances per year to be sustainable over the longer term. Obviously, labor and other costs will also be decreased in the transition to a leaner City Opera.

51. City Opera is developing a special fundraising initiative designed to attract "new" gifts – that is, a program designed (a) to encourage existing donors to increase their giving and (b) to attract first-time donors to City Opera. "Challenge grants" are frequently used in this type of fundraising initiative, so that new donors are able to leverage the value of their gifts. One goal of this program, of course, will be attract new donors who will remain for many years as part of the City Opera family of donors.

52. City Opera views the restoration of its endowment as a critical element in its ability to survive and thrive in the long term. Accordingly, City Opera plans to launch an endowment fundraising campaign. This campaign – which is closely linked to the institutional marketing campaign described above – will enhance and hasten City Opera's ability to replenish

the amounts it has already borrowed from the Wallace Fund and the additional amount that it seeks to borrow in this Petition. In addition, City Opera has established a benchmark that budgets beginning in 2010-2011 aspire to enable the restoration of at least \$2 million annually to the Wallace Fund, until it is restored at least to the level required by the Oct. 28, 2008 Order.

### **City Opera's Financial Plan**

53. Closely linked to City Opera's strategic plan is a financial plan that quickly restores City Opera to operating surpluses. Mr. Kaiser has advised the Board that City Opera must achieve "steady state," meaning balanced budgets and a size compatible with long-term financial health, in order to be a sustainable organization. Mr. Kaiser has concluded, based on his analysis, that City Opera cannot achieve steady state immediately but could do so in fairly short order. For this to work, Mr. Kaiser has advised, City Opera must weather the balance of its current fiscal year (2008-2009), use the critical year of transition (2009-2010) to improve fundraising and redefine itself as a lean but artistically excellent opera company, and begin to operate in its new steady state in the year after that (2010-2011). Hence, the financial plan (which has been developed in consultation with Mr. Kaiser and has been presented to the Attorney General for his review) anticipates that both 2008-2009 and 2009-2010 will be transitional years in which a deficit will remain. However, once the elements of the strategic plan are in place, the financial plan projects an operating surplus of more than \$1.1 million for 2010-2011. Furthermore, based on City Opera's projected cash-flows for 2009-2010 and 2010-2011, City Opera projects it will be able to restore as much as \$2,000,000 to the Wallace Fund by the end of 2009-2010 – and annually thereafter until the Wallace Fund is restored to the level required by the Oct. 28, 2008 Order.

54. One key element of the financial plan is the dramatic reduction in

production-related expenses occasioned by the reduction in the number of performances. A significant expense reduction will help City Opera “right size” itself and achieve sustainability.

55. City Opera projects that its special fundraising initiative aimed at adding new donors, described in ¶ 51, will contribute as much as \$7 million of new donations in 2009-2010 and another \$2 million or more in 2010-2011. This initiative, which is in addition to City Opera’s traditional fundraising efforts, will play an important role not only in meeting the cash-flow needs of 2009-2010 and 2010-2011 but also in attracting a larger base of donors and achieving and maintaining a higher baseline for contributions in 2010-2011 and beyond. By 2010-2011, City Opera projects its baseline for contributions will have advanced significantly from \$14 million annually (where it has been for a number of years).

56. City Opera’s objective in presenting this Petition is to obtain relief that will enable it to bridge the gap between where it is today and where it plans to be by the time it can achieve steady state in 2010-2011. As a result of the lost ticket sales during 2008-2009 and, to a lesser degree, the impact of the world financial downturn on contributions (particularly corporate contributions), City Opera simply does not have the cash it needs to complete the 2008-2009 fiscal year or commence the 2009-2010 fiscal year on a firm financial footing. This situation was anticipated when City Opera first came before this Court in October 2008, and it has indeed come to pass. In order for City Opera to weather this unavoidable period of transition, City Opera seeks the ability to borrow up to \$6,600,000 more from the Wallace Fund. Petitioner projects that that amount of borrowing, together with the amounts City Opera already has permission to borrow from the Wallace Fund, will enable City Opera to continue operations for the balance of 2008-2009 and the early part of 2009-2010. The remaining balance of the Wallace Fund, after the draw-down of the requested \$6,600,000 in additional borrowings, is

projected to be approximately \$3,000,000.

57. In 2009-2010, City Opera will begin to experience some of the benefits of its strategic plan and, in addition, expects to receive a reimbursement from the Koch Theater capital campaign designed to compensate City Opera for at least a portion of the ticket revenues it has lost on account of the renovation. These developments, together with the relief requested in this Petition, will enable City Opera to present a 2009-2010 season in the freshly renovated Koch Theater, continue with the implementation of the strategic plan outlined above, begin to rebuild its endowment, and achieve steady-state operations by 2010-2011.

58. Even as City Opera has experienced a financially challenging period, the venerable company has many valuable assets:

- (a) A loyal audience devoted to the mission of the organization;
- (b) A loyal donor base that has continued to contribute to City Opera even in a financially turbulent year when the organization was unable to present a single performance in its home at Lincoln Center;
- (c) A warehouse of sets and costumes for important and diverse productions;
- (d) A prominent location at the heart of the most important cultural campus in the world, which is on the verge of completing a historic redevelopment; and
- (e) The imminent opening of a newly renovated theater.

59. These abundant assets are coupled with a fresh and detailed strategic and financial plan developed in consultation with Michael Kaiser, one of the world's pre-eminent performing arts executives. Now, under the leadership of the dynamic and resourceful George Steel, City Opera is poised to survive this transition period and emerge by 2010-2011 as



an enduring and financially sustainable cultural enterprise. For this plan to be realized, however, it is critical that City Opera obtain the relief it seeks in this Petition.

### **CAUSE OF ACTION**

60. Petitioner repeats and re-alleges paragraphs 1 through 59 above as if fully set forth herein.

61. The names, addresses and interests of all persons required to be cited hereunder are as follows:

<u>Name and Relationship</u>	<u>Address</u>	<u>Nature of Interest</u>
Attorney General	120 Broadway New York City, NY 10271	Statutory representative of ultimate charitable beneficiaries

All of the above-named persons are of full age and sound mind.

62. There are no persons interested in this proceeding other than those hereinabove mentioned.

63. No prior application has been made to this or any other court for the relief herein requested. Although Petitioner obtained cy pres relief with respect to the Wallace Fund, by Order of this Court dated October 28, 2008, the request for relief contained in this Petition is in addition to, and as such separate and apart from, the request that was granted in that Order.

64. Section 8-1.1(c) of the New York Estates, Powers and Trusts Law states in relevant part that:

[W]henever it appears to [the] court that circumstances have so changed since the execution of an instrument making a disposition for religious, charitable, educational or benevolent purposes as to render impracticable or impossible a literal compliance with the terms of such disposition, the court may...make an order or decree directing that such disposition be administered and applied in such

manner as in the judgment of the court will most effectively accomplish its general purposes, free from any specific restriction, limitation or direction contained therein....

65. In view of Petitioner's financial situation, Petitioner respectfully requests that the Court exercise its equitable power to administer cy pres relief and grant City Opera the right to borrow an additional \$6,600,000 from the Wallace Fund in order to fund its cash-flow needs during its 2008-2009 fiscal year and its 2009-2010 fiscal year and direct City Opera to restore to the Wallace Fund the net amounts so borrowed from it as City Opera has net financial resources that may be prudently used for that purpose consistent with the legal restrictions on the use of such resources. The right to borrow from and the obligation to restore amounts to the Wallace Fund arising by reason of this Petition will be in addition to (and not in lieu of) the rights and obligations of City Opera under the Oct. 28, 2008 Order, which rights and obligations will continue until exercised or performed, as the case may be.

66. The Attorney General of the State of New York has submitted an Affidavit of No Objection with respect to the relief sought herein.

WHEREFORE, the Petitioner respectfully prays that this Court declare that Petitioner is entitled to cy pres relief pursuant to Section 8-1.1(c) of the New York Estates, Powers and Trusts Law and in furtherance of such cy pres relief:

(a) Direct that Petitioner may borrow from the Wallace Fund (in addition to those amounts which Petitioner may expend pursuant to the terms of the Wallace Agreement and applicable law and the amounts it may borrow pursuant to the Order of this Court dated October 28, 2008) up to \$6,600,000 in order to fund its cash-flow needs during its 2008-2009 fiscal year and its 2009-2010 fiscal year.

(b) Direct that in addition to fulfilling its obligations under the October 28, 2008 Order, Petitioner restore to the Wallace Fund the net amounts borrowed from it pursuant to paragraph (a) as Petitioner has net financial resources that may be prudently used for that purpose consistent with the legal restrictions on the use of such resources.

(c) Direct that Petitioner submit a written annual report to the Attorney General of the State of New York (the "Attorney General") within six months after the close of each fiscal year of Petitioner ending on or after June 30, 2009 concerning the extent, if any, to which Petitioner, whether through contributions, accumulation of income, or capital appreciation, has during such fiscal year restored the value of the Wallace Fund as required by this Order and the Order of this Court dated October 28, 2008, such obligation to continue until such time as Petitioner can report that it has restored the amounts required by paragraph (b) and the October 28, 2008 Order.

(d) Direct that Petitioner's senior management provide to the Board of Directors or the Executive Committee of the Board of Directors a written report, not less often than once a month, concerning variances from the budget for the 2009-2010 fiscal year as such budget is in effect (and approved by the Board of Directors or the Executive Committee) from time to time.

(e) Direct that Petitioner's senior management provide to the Board of Directors or the Executive Committee of the Board of Directors, not less often than once every two weeks, an updated written cash-flow projection for the balance of the 2008-2009 fiscal year and for the 2009-2010 fiscal year.

(f) Direct that Petitioner for the balance of the 2008-2009 fiscal year and for the 2009-2010 fiscal year report periodically, but in no event less frequently than once a month, to an independent financial advisor concerning the strategic plan and financial plan that was previously developed in consultation with independent financial advisor Michael M. Kaiser, for the purpose of reviewing budget variances with the advisor, obtaining the advisor's assessment of the continued viability of such strategic plan and financial plan, and identifying alternative courses of action as warranted. The advisor retained for such purpose may continue to be Michael M. Kaiser or, alternatively, shall be another individual selected by Petitioner and approved by the Attorney General (such approval not to be unreasonably withheld).

(g) Direct that Petitioner's Board of Directors continue the on-going evaluation of the effectiveness of Petitioner's governance, financial and risk management, investment management policies practices, and systems of internal controls and, following consultation with the Attorney General, adopt appropriate enhancements thereto.

(h) Direct that Petitioner designate or retain a qualified individual to perform the roles and functions of chief financial officer.

(i) Direct that Petitioner for the balance of the 2008-2009 fiscal year and for the 2009-2010 fiscal year report periodically, but not less often than once per calendar quarter, to the Attorney General concerning its compliance with the terms of this Order and its projections concerning its anticipated ability to restore amounts to the Wallace Fund in accordance with this Order and the Order of this Court dated October 28, 2008.

- (j) Grant such further relief as the Court may deem just and proper.

New York, NY  
April 9, 2009

PATTERSON BELKNAP WEBB & TYLER LLP

By: 

Andrew D. Schau

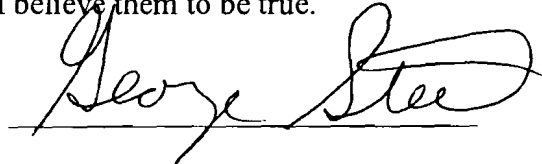
1133 Avenue of the Americas  
New York, New York 10036  
(212) 336-2000

*Attorneys for Petitioner\**

**VERIFICATION**

STATE OF NEW YORK        )  
                                      : ss.:  
COUNTY OF NEW YORK    )

The undersigned, George Steel, the General Manager and Artistic Director of New York City Opera, Inc., the petitioner named in the foregoing petition, being duly sworn, deposes and says that I have read the foregoing petition and know the contents thereof; and that the same is true of my own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters I believe them to be true.

  
\_\_\_\_\_

Sworn to before me this  
9 day of April, 2009

\_\_\_\_\_  
Notary Public

**OLGA AGARKOVA**

**Notary Public - State of New York**

**No. 01AG6155148**

**Qualified in Kings County**

**My Commission Expires November 6, 2010**

Index No.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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In the Matter of the Application of  
NEW YORK CITY OPERA, INC.,

Petitioner,

For cy pres relief pursuant to Section 8-1.1(c) of the  
Estates, Powers and Trusts Law of the State of New  
York.

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PETITION

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**Patterson Belknap Webb & Tyler LLP**  
Attorneys for Petitioner

1133 Avenue of the Americas  
New York, New York 10036-6710  
Telephone: (212) 336-2000

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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	:	
In the Matter of the Application of	:	
NEW YORK CITY OPERA, INC.,	:	CERTIFICATION PURSUANT TO
	:	22 NYCRR § 130-1.1a(b)
Petitioner,	:	
	:	Index No.
For cy pres relief pursuant to Section 8-1.1(c) of the	:	
Estates, Powers and Trusts Law of the State of	:	
New York.	:	
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I hereby certify pursuant to 22 NYCRR § 130-1.1a(b) that, to the best of my knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of the papers listed below or the contentions therein are not frivolous as defined in 22 NYCRR § 130-1.1(c):

Dated: New York, New York  
April 9, 2009

  
\_\_\_\_\_  
Signature

ANDREW D. SCHAU

PATTERSON BELKNAP WEBB & TYLER LLP  
1133 Avenue of the Americas  
New York, New York 10036  
(212) 336-2000

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Index No.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

In the Matter of the Application of  
NEW YORK CITY OPERA, INC.;

Petitioner,

For cy pres relief pursuant to Section 8-1.1(c) of the  
Estates, Powers and Trusts Law of the State of New  
York.

CERTIFICATION PURSUANT TO  
22 NYCRR § 130-1.1a(b)

Patterson Belknap Webb & Tyler LLP  
Attorneys for Petitioner

1133 Avenue of the Americas  
New York, New York 10036-6710  
Telephone: (212) 336-2000



in a position to so inform its employees at the earliest possible date. **Accordingly, Petitioner respectfully requests that this Court grant its request for cy pres relief no later than April 22,** and if not on that date, on the earliest date thereafter as is possible. The Attorney General of the State of New York is the only other interested party in this proceeding and does not object to the emergency relief sought herein.

3. In its Verified Petition, Petitioner seeks the ability (under the principle of cy pres pursuant to N.Y. Estates, Powers & Trusts Law Section 8-1.1(c)) to withdraw otherwise restricted funds from an endowment fund more fully described in the Verified Petition and referred to therein as the “Wallace Fund.” In particular, Petitioner seeks relief:

- (a) Directing that Petitioner may borrow from the Wallace Fund (in addition to those amounts which Petitioner may expend pursuant to the terms of the Wallace Agreement and applicable law and the amounts it may borrow pursuant to the Order of this Court dated October 28, 2008) up to \$6,600,000 in order to fund its cash-flow needs during its 2008-2009 fiscal year and its 2009-2010 fiscal year;
- (b) Directing that in addition to the fulfilling its obligations under the Oct. 28, 2008 Order, Petitioner restore to the Wallace Fund the net amounts borrowed from it pursuant to paragraph (a) as Petitioner has net financial resources that may be prudently used for that purpose consistent with the legal restrictions on the use of such resources;
- (c) Directing that Petitioner submit a written annual report to the Attorney General of the State of New York (the “Attorney General”) within six months after the close of each fiscal year of Petitioner ending on or after June 30, 2009 concerning the extent, if any, to which Petitioner, whether through contributions, accumulation of income, or capital appreciation, has during such fiscal year restored the value of the Wallace Fund as required by this Order and the Order of this Court dated October 28, 2008, such obligation to continue until such time as Petitioner can report that it has restored the amounts required by paragraph (b) and the October 28, 2008 Order;
- (d) Directing that Petitioner’s senior management provide to the Board of Directors or the Executive Committee of the Board of Directors a written report, not less often than once a month, concerning variances from the budget for the 2009-2010 fiscal year as such budget is in effect (and

approved by the Board of Directors or the Executive Committee) from time to time;

- (e) Directing that Petitioner's senior management provide to the Board of Directors or the Executive Committee of the Board of Directors, not less often than once every two weeks, an updated written cash-flow projection for the balance of the 2008-2009 fiscal year and for the 2009-2010 fiscal year;
- (f) Directing that Petitioner for the balance of the 2008-2009 fiscal year and for the 2009-2010 fiscal year report periodically, but in no event less frequently than once a month, to an independent financial advisor concerning the strategic plan and financial plan that was previously developed in consultation with independent financial advisor Michael M. Kaiser, for the purpose of reviewing budget variances with the advisor, obtaining the advisor's assessment of the continued viability of such strategic plan and financial plan, and identifying alternative courses of action as warranted. The advisor retained for such purpose may continue to be Michael M. Kaiser or, alternatively, shall be another individual selected by Petitioner and approved by the Attorney General (such approval not to be unreasonably withheld);
- (g) Directing that Petitioner's Board of Directors continue the on-going evaluation of the effectiveness of Petitioner's governance, financial and risk management, investment management policies practices, and systems of internal controls and, following consultation with the Attorney General, adopt appropriate enhancements thereto;
- (h) Directing that Petitioner designate or retain a qualified individual to perform the roles and functions of chief financial officer;
- (i) Directing that Petitioner for the balance of the 2008-2009 fiscal year and for the 2009-2010 fiscal year report periodically, but not less often than once per calendar quarter, to the Attorney General concerning its compliance with the terms of this Order and its projections concerning its anticipated ability to restore amounts to the Wallace Fund in accordance with this Order and the Order of this Court dated October 28, 2008;
- (j) Granting such further relief as the Court may deem just and proper.

4. The Verified Petition herein is being filed pursuant to Section 8-1.1(c) of

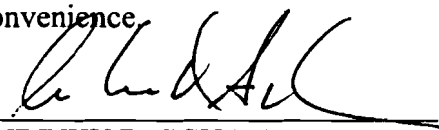
the N.Y. Estates, Powers & Trusts Law. The only interested party in this application is the

Attorney General of the State of New York. See N.Y. Estates, Powers & Trusts Law Sections 8-

1.1(c) and 8-1.1(f). The Attorney General has provided an Affidavit of No Objection in support of

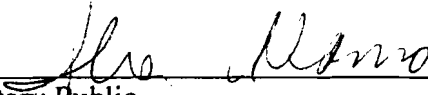
the relief requested herein, on certain conditions, which are incorporated in the Prayer for Relief and the proposed Order submitted herein. The Attorney General's Affidavit of No Objection is being filed simultaneously with the Verified Petition herein.

5. In light of the Attorney General's Affidavit of No Objection and in light of the exigent circumstances facing Petitioner, Petitioner respectfully requests that the Court schedule an expedited hearing to hear and determine the relief requested in Petitioner's prayer for relief. We have submitted a proposed Order to Show Cause and respectfully request a hearing date on Petitioner's application at the Court's earliest possible convenience.

  
ANDREW D. SCHAU

Sworn to before me this

9<sup>th</sup> day of April, 2009

  
Notary Public

**ILIA ALAMO**  
Notary Public, State of New York  
No. 01AL6157268  
Qualified in Bronx County  
Commission Expires December 04, 2010

Index No.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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In the Matter of the Application of  
NEW YORK CITY OPERA, INC.,

Petitioner,

For cy pres relief pursuant to Section 8-1.1(c) of the  
Estates, Powers and Trusts Law of the State of New  
York.

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AFFIDAVIT OF ANDREW D. SCHAU IN SUPPORT OF  
APPLICATION FOR EMERGENCY RELIEF

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**Patterson Belknap Webb & Tyler LLP**  
Attorneys for Petitioner

1133 Avenue of the Americas  
New York, New York 10036-6710  
Telephone: (212) 336-2000

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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In the Matter of the Application of	:
NEW YORK CITY OPERA, INC.	:
	:
	:
Petitioner,	:
	:
	Index No.
	:
For cy pres relief pursuant to Section 8-1.1(c) of the	:
Estates, Powers and Trusts Law of the State	:
of New York.	:
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**MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S APPLICATION  
FOR CY PRES RELIEF FROM CERTAIN ENDOWMENT FUND RESTRICTIONS**

John P. Sare  
Andrew D. Schau  
Caroline W. Trowbridge  
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New York, NY 10036-6710  
(212) 336-2000  
*Attorneys for Petitioner*  
*New York City Opera, Inc.*

New York City Opera, Inc. ("City Opera" or the "Petitioner") submits this Memorandum of Law in support of its duly verified petition (the "Petition"), dated April 9, 2009, requesting that this Court, pursuant to its cy pres power under the Estates, Powers and Trusts Law of the State of New York ("EPTL"), Section 8-1.1(c), issue an order permitting Petitioner to borrow an additional \$6,600,000 million from an endowment fund (the "Wallace Fund," as hereinafter defined) in order to fund its cash-flow needs during its current 2008-2009 fiscal year and its 2009-2010 fiscal year.<sup>1</sup> This relief is sought in order to enable City Opera to weather a period in which it continues to face an array of financial challenges, including the loss of virtually all ticket revenues (due to the renovation of its home in the David H. Koch Theater at Lincoln Center), the effects of the worldwide economic downturn, and union contract guarantees and other substantial costs that it cannot avoid or materially reduce even in the face of these adverse financial conditions.

The relief sought in this Petition supplements relief obtained by Petitioner in a proceeding before this Court in October 2008, in which Petitioner sought a modification of the restrictions of the Wallace Fund to permit the borrowing of \$17,520,000 from the Wallace Fund to pay down certain debt left over from its 2007-2008 fiscal year and meet pressing cash-flow needs. The Court granted that Petition in an order issued on October 28, 2008 (the "Oct. 28, 2008 Order" or the "Order"). *See* Exhibit A, Supplemental Affidavit of Andrew D. Schau, dated April 9, 2009 (the "Schau Affidavit" or "Schau Aff."). At that time, Petitioner informed the Court that it anticipated the need to make a supplemental request for cy pres relief, but Petitioner deferred the request until it had the opportunity to refine its financial plan for the future.

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<sup>1</sup> In addition, the relief requested requires Petitioner to restore to the Wallace Fund the net amounts borrowed from it as Petitioner has net financial resources that may be prudently used for that purpose consistent with the legal restrictions on the use of such resources.



Petitioner has now developed a financial and strategic plan, in consultation with an eminent, independent financial advisor<sup>2</sup> approved by the New York Attorney General, and has presented the plan to the Attorney General (as required by the Oct. 28, 2008 Order). Having reviewed the plan, the Petition herein and this Memorandum of Law, the Attorney General has provided an Affidavit of No Objection to the relief requested herein.

### **PRELIMINARY STATEMENT**

City Opera is a Type B not-for-profit corporation founded in 1943 and organized in and under the laws of the State of New York in order to offer high quality, popularly-priced opera to all New Yorkers. Petition ¶ 12. City Opera is a constituent part of Lincoln Center for the Performing Arts, Inc. and has for decades been a bedrock cultural institution of New York. Petition ¶ 12.

City Opera is a matter of months away from being part of a revitalized Lincoln Center campus, now undergoing a \$1 billion redevelopment that is slated for completion in 2010 and is expected to make Lincoln Center an even greater draw than it already is for audiences from throughout the region and the world.

City Opera is also months away from reaping the benefits of a newly renovated opera house. City Opera is, along with New York City Ballet, Inc. (“City Ballet”), an “anchor company” of the David H. Koch Theater (the “Koch Theater”) at Lincoln Center. The Koch Theater is owned by New York City, which leases it to Lincoln Center, which in turn subleases it to the City Center for Music and Drama (“CCMD”). The Koch Theater is made available to City Opera and City Ballet under a long-term contractual relationship with CCMD in which City

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<sup>2</sup> The independent advisor is Michael M. Kaiser, the President of the John F. Kennedy Center for the Performing Arts, Inc., in Washington, D.C. The designation of an independent financial advisor acceptable to the Attorney General was required by the Court in the Oct. 28, 2008 Order.

Opera and City Ballet are required to cover virtually all the costs associated with operating and maintaining the theater.

It has long been a goal for City Opera to renovate the Koch Theater (formerly known as the "New York State Theater") in order to modernize the house and rectify perceived acoustical shortcomings. In July 2008, the substantial commitment made by philanthropist David H. Koch to CCMD, along with other funding, made this renovation possible.

The renovations will upgrade the Koch Theater to the high-quality facility City Opera has long needed, but they have prevented City Opera from performing in the theater during its current 2008-2009 season. With only six major New York performances scheduled this season (all of them at venues other than the Koch Theater), City Opera expects to earn less than \$320,000 from ticket sales this season, a vast decline from its usual figures – more than \$13 million in the 2005-2006 and 2006-2007 seasons, and nearly \$12 million during 2007-2008. The loss this season of City Opera's home in the Koch Theater has had and continues to have a profound impact on City Opera's finances.

This season's lost revenue follows a period in which City Opera's finances were already strained. Since the terrorist attacks on New York City on September 11, 2001, City Opera has struggled to respond to the various challenges of lowered attendance at cultural events and reduced donations, as well as long-term changes in tastes and ticket-buying preferences. During the same period, by contrast, City Opera has seen escalating fixed costs related to theater operations and labor, including union contracts – a not-insignificant burden considering that City Opera employs hundreds of people on a full- and part-time basis. The presence of these fixed costs also meant that, when faced with this season's lost ticket revenue, City Opera could not mitigate the loss with a reduction in costs.

At the end of the 2006-2007 season, in an effort to build attendance, attract new philanthropic support, and surmount these financial hurdles, City Opera engaged Gerard Mortier as General Manager and Artistic Director and asked him to revitalize City Opera's programming on a large scale beginning with the 2009-2010 season, the concept being that a large-scale transformation was needed to catapult City Opera to a strong financial position and restore City Opera to operating surpluses. However, in the spring and summer of 2008, just as Mr. Mortier's planning for the 2009-2010 season began to take shape, world financial markets began to deteriorate, and by the fall of 2008, those markets were experiencing unprecedented turmoil and steep declines. Thus, by the fall of 2008, City Opera faced a pair of daunting challenges: a darkened theater (with its adverse effect on ticket revenues) and a worldwide financial crisis (with the accompanying damage to the value of City Opera's endowment).

This was the context in which City Opera made its first application for cy pres relief with respect to the Wallace Fund. In that proceeding, City Opera secured this Court's permission to borrow \$9,500,000 from the Wallace Fund to pay down indebtedness carried forward from the financially disappointing 2007-2008 season and \$8,020,000 to meet City Opera's immediate cash-flow needs. That relief has enabled City Opera to meet its financial obligations since October 2008, but it is not sufficient to enable City Opera to complete the current fiscal year (which ends on June 30, 2009) or commence the next fiscal year in a sustainable financial position.

Significantly, the world financial situation continued to deteriorate after the Oct. 28, 2008 Order. The changing global economy led the Board to reevaluate the feasibility of achieving Mr. Mortier's vision, which would have required an annual budget of \$60 million (nearly twice City Opera's customary budget), and to conclude that such a budget was no longer

sustainable. Even though City Opera had dedicated itself in 2007 to a financial model based on the compelling vision of its new leader and had pursued that strategy for much of 2008, it was becoming clear as the year drew to a close that the rapid growth required by his vision was not sustainable and that transformation would have to take some other form. Accordingly, it was announced in November 2008 that Mr. Mortier would step down, that a new (and leaner) financial model would be developed, and that a new leader would be chosen and given a mandate to present an artistically exciting season within substantially reduced financial parameters.

As part of the strategic planning process in which City Opera has engaged since the Oct. 28, 2008 Order, with advice from Mr. Kaiser, its independent advisor, City Opera has determined that, in the current economic environment, it must become a more flexible and somewhat smaller organization in order to be a sustainable cultural enterprise. Even though plans made in 2006 and early 2007 (before the global economy began to deteriorate) had envisioned institutional transformation through Mr. Mortier's singular vision, necessarily accompanied by a significant escalation of budgets and fundraising, the state of the world economy since September 2008 has forced City Opera to adopt a new and leaner financial strategy. This strategy is predicated on strong, flexible leadership possessed of an undiminished commitment to City Opera's core artistic values: championing new works, reviving significant American operas and 19th-20th century operas, rediscovering baroque and early classical works, producing visionary productions of the standard repertoire, and launching the careers of talented American singers. City Opera will also continue to provide high-quality performances at reasonable prices and will redouble its efforts to invest in important educational projects, freed of some of the cost pressures it has faced in the past.

City Opera plans to reduce its annual operating budget to the range of \$30 million to \$35 million annually (down from \$38 million to \$43 million or more in recent seasons but slightly more than the budget for the transitional year of 2009-2010). City Opera has concluded that \$30 million to \$35 million annual budgets provide parameters that will be reasonable and sustainable for the foreseeable future.

By hiring a new top executive, City Opera has already accomplished a core element of its strategic plan. City Opera has directed its new leader George Steel to undertake, on an expedited basis, an array of strategic priorities: developing 2009-2010 and 2010-2011 seasons that are within City Opera's new budget limit, ensuring that the programming for these seasons creates a distinct identity for City Opera, reconfiguring City Opera's cost structure, implementing a bold new marketing initiative, and strengthening City Opera's fundraising.

Closely linked to City Opera's strategic plan is a financial plan that quickly restores City Opera to operating surpluses. The financial plan anticipates that both 2008-2009 and 2009-2010 will be transitional years in which a deficit will remain. However, once the elements of the strategic plan are in place, the financial plan projects an operating surplus of more than \$1.1 million for 2010-2011. Furthermore, based on City Opera's projected cash-flows for 2009-2010 and 2010-2011, City Opera projects it will be able to restore as much as \$2,000,000 to the Wallace Fund by the end of 2009-2010 – and annually thereafter until the Wallace Fund is restored to the level required by the Oct. 28, 2008 Order.

City Opera's objective in petitioning the Court is to obtain relief that will enable it to bridge the gap between where it is today and where it plans to be by the time it can achieve steady state in 2010-2011. As a result of the lost ticket sales during 2008-2009 and, to a lesser degree, the impact of the world financial downturn on contributions (particularly corporate

contributions), City Opera simply does not have the cash it needs to complete the 2008-2009 fiscal year or commence the 2009-2010 fiscal year on a firm financial footing. This situation was anticipated when City Opera first came before this Court in October 2008, and it has indeed come to pass. In order for City Opera to weather this unavoidable period of transition, City Opera seeks the ability to borrow up to \$6.6 million more from the Wallace Fund. Petitioner projects that that amount of borrowing, together with the amounts City Opera already has permission to borrow from the Wallace Fund, will enable City Opera to continue operations for the balance of 2008-2009 and the early part of 2009-2010.

The Wallace Fund is governed by an agreement (the “Wallace Agreement”) effective as of April 30, 2001, by and among the Wallace Fund for Lincoln Center (“WFLC”), as the donor, and City Opera and certain constituent organizations of Lincoln Center. *See* Exhibit E, Schau Aff. For purposes of this Memorandum of Law, three provisions of the Wallace Agreement are of particular relevance.

Paragraph B. Paragraph B requires that the Wallace Fund be maintained “in perpetuity as an endowment.” That language, standing on its own, would ordinarily establish that the historic dollar value of the Wallace Fund (generally, the amount contributed to it less depreciation)<sup>3</sup> is subject to a requirement that it be held in perpetuity. Yet subsequent provisions of the Agreement specifically provide otherwise through mechanisms that permit the Wallace Fund to be drawn below its historic dollar value<sup>4</sup>: the “Annual Contribution” (Paragraph C) and the “Special Contribution” (Paragraph D).

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<sup>3</sup> See N.Y. Not-for-Profit Corp. Law (hereinafter “N-PCL”) § 103(a)(16) (McKinney’s 2008).

<sup>4</sup> The Wallace Agreement uses the term “Original Fair Market Value,” a term whose definition in Paragraph D(4) as the value of all assets transferred pursuant to the Wallace Agreement “valued on the date of distribution” makes the term the functional equivalent of the statutory term “historic dollar value.”

Paragraph C. Paragraph C provides that the Annual Contribution from the Wallace Fund “shall be determined by” Petitioner. In drawing its Annual Contribution, Petitioner will “apply a spending policy, as approved by [Petitioner’s] Board of Trustees, to the [Wallace Fund] in no greater percentage and in the same manner as such spending policy is applied to [Petitioner’s] other endowment funds.” The application of the spending policy “may reduce the value of the [Wallace Fund] to below its Original Fair Market Value [i.e., its historic dollar value], in which case [Petitioner] shall have no obligation to restore the [Wallace Fund] to such Original Fair Market Value.” This aspect of the Wallace Fund distinguishes it from Petitioner’s other endowment funds, which are subject to donor-imposed restrictions that treat the historic dollar value, or some other portion of the fund, as an amount that may not be expended or may not be expended without repayment. Petition ¶ 32. Paragraph E specifies the purposes for which Annual Contributions may be made: Special Projects (a category defined as “new works or new productions or new performances, or to underwrite touring of new productions or repertory, or to support educational or audience outreach programs”) as well as “other priority needs identified by” Petitioner.

Paragraph D. Paragraph D provides that Special Contributions may be drawn from the Wallace Fund for Special Projects, subject to a variety of special requirements such as the ability of City Opera to “match” the Special Contributions on a two-to-one basis with other resources and obtain super-majority vote of the Board, including a Board determination that there is an “extraordinary need” for the Special Project. Thus, Special Contributions are available for a narrower scope of City Opera activities, and in more limited circumstances, than Annual Contributions. Special Contributions are not available at all to the extent they would reduce the value of the Wallace Fund below 80% of its historic dollar value or amount in the

aggregate to more than 20% of the fair market value of the Wallace Fund. Paragraph D(3). City Opera has drawn down Special Contributions from the Wallace Fund during each of the preceding three fiscal years and has now reached the limits of what it may draw down by way of Special Contributions. Although net appreciation of an endowment fund is theoretically available for expenditure,<sup>5</sup> there is no longer any net appreciation remaining in the Wallace Fund. Accordingly, the sole means at present by which City Opera may tap into the Wallace Fund is by way of Annual Contributions.

Petitioner has set its endowment spending rate at 5.5% for the current fiscal year (2008-2009). The rate was 6% during the past two fiscal years. So long as Petitioner's endowment spending rate remains fixed in this 5% to 6% range (which Petitioner believes to be a traditional rate for an endowment spending rate), Petitioner is unable to dip more deeply into the Wallace Fund (i.e., into its remaining historic dollar value) by way of Annual Contributions.<sup>6</sup> Petition ¶ 35. Accordingly Petitioner must obtain the requested cy pres relief in order to tap more deeply into the Wallace Fund.

The relevant facts are set forth in greater detail in the accompanying Petition, the Supplemental Schau Affidavit, and the Affidavit of Emergency of Andrew D. Schau dated April 9, 2009 to which we respectfully refer the Court.

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<sup>5</sup> See N-PCL § 513(c).

<sup>6</sup> Based on one possible construction of the Wallace Agreement, Petitioner could increase its endowment spending rate in order to increase the amount of Annual Contributions. However, given the extent of City Opera's needs, it would be necessary that any such increase be at a level that would be highly unusual for an educational or cultural institution. Petitioner believes that it is uncertain whether the language of the Wallace Agreement mandating that Petitioner's spending policy be applied "in no greater percentage and in the same manner as such spending policy is applied to [its] other endowment funds" would permit such a dramatic increase in the spending rate to be applied against the Wallace Fund. In the absence of certainty on this point, City Opera has elected to preserve its endowment spending rate at a traditional level and instead to seek the cy pres relief requested in this proceeding.



## ARGUMENT

The New York Not-for-Profit Corporation Law provides that City Opera may appropriate its endowment assets only to the extent of realized appreciation and, with respect to readily marketable assets, unrealized appreciation over the historic dollar value of the gift, except as otherwise permitted under other law, the terms of the applicable gift instrument, or the certificate of incorporation. N-PCL § 513(c). The doctrine of cy pres is a rule of judicial construction which permits a court “to effectuate the general charitable intention of a donor or testator where the specific donative direction cannot be carried out, or is no longer practicable.” *In re Estate of Donald F. Othmer (“Othmer I”)*, 185 Misc.2d 122, 126, 710 N.Y.S.2d 848 (Sur. Ct. Kings County 2000). Hence, the doctrine of cy pres may be invoked in appropriate circumstances as the basis for relief from donor-imposed restrictions, including a restriction on the amount of funds that may be spent from an endowment.

The EPTL provides in relevant part:

Whenever it appears to [the Court] that circumstances have so changed since the execution of an instrument making a disposition for religious, charitable, educational or benevolent purposes as to render *impracticable or impossible* a literal compliance with the terms of such disposition, the court may . . . make an order or decree directing that such disposition be administered and applied in such manner as in the judgment of the court will most effectively accomplish its general purposes, free from any specific restriction, limitation or direction contained therein. . . .

EPTL § 8-1.1(c) (emphasis added).

In order to qualify for cy pres relief, a petitioner must demonstrate that (1) the gift is charitable in nature; (2) the donor demonstrated a general, rather than a specific, charitable intent; (3) the particular purpose for which the gift was made has failed, or has become impossible or impracticable to achieve; and (4) a modification of the specific terms of the gift cures the impracticability and most effectively accomplishes the general charitable purpose of

the donor. *In re Estate of Mildred Othmer* ("Othmer II"), 12 Misc.3d 919, 815 N.Y.S.2d 444, 447 (Sur. Ct. Kings County 2006); *Estate of Randall*, 71 Misc.2d 1063, 338 N.Y.S.2d 269 (Sur. Ct. N.Y. County 1972).

The Court's Oct. 28, 2008 Order was premised on those four factors having been met with respect to the first Petition. Because this Petition is made with respect to the same gift instrument as the first Petition, the facts pertaining to the first two criteria remain the same and, under the doctrine of collateral estoppel, need not be reconsidered. *See Othmer II*, 12 Misc.3d 919 at 925 (in second cy pres petition, based on the same gift instrument, the doctrine of collateral estoppel is appropriate with regard to first two factors of cy pres test, as the court had earlier found the gift to be charitable in nature and the donors to have had a general charitable intent). In this case, the facts pertaining to the third criterion have also remained the same, as Petitioner's earlier request noted that the circumstances requiring it to seek cy pres relief at that time were expected to require a request for further relief at a later date – relief that this Petition represents. Thus it is only the fourth criterion – concerning the ability of the requested relief to accomplish the Wallace Fund's charitable purposes – that requires further analysis or consideration. As explained in greater detail below, the facts pertaining to the fourth criterion establish that the requested relief will most effectively accomplish the Wallace Fund's charitable purposes.

In the event that the Court would benefit from a full explanation of all four criteria, however, the analysis of each is set forth below.

1. The Wallace Fund is charitable in nature.

The first condition for cy pres relief – the charitable nature of the Wallace Fund – is readily satisfied. The Wallace Fund was created by WFLC, a Type B New York not-for-profit

corporation formed exclusively for scientific, literary, charitable and educational purposes by operating exclusively for the benefit of City Opera and certain constituent organizations of Lincoln Center. *See* Exhibit C, Schau Aff.; Petition ¶ 23 - 24. The distribution to City Opera which resulted in the creation of the Wallace Fund was approved by this Court in connection with the dissolution of WFLC in 2001. *See* Exhibit C, Schau Aff. Like WFLC, City Opera is a tax-exempt, Type B New York not-for-profit corporation formed exclusively for charitable, literary and educational purposes, including through the encouragement of the study of the art of opera and the presentation, development and encouragement of the highest excellence in opera. Any gift made, as this one was, to promote or advance education and literature has always been recognized as charitable. *In re Polytechnic University*, 812 N.Y.S. 2d 304, 310 (Sur. Ct. Kings County 2006).

2. The donor of the Wallace Fund demonstrated a general charitable intent.

The second condition for cy pres relief – the general charitable intent of the donor – also is satisfied with ease. As the Court stated in *Othmer I*: “Where a . . . donor of a gift shows an inclination to benefit a variety of charities, a court is likely to conclude that the donor had a general charitable intent and to apply the cy pres doctrine in the appropriate circumstances.” *Othmer I*, 185 Misc.2d at 127 (also citing *Matter of Bowne*, 11 Misc. 2d 597, in which “the court considered 15 charitable gifts totaling \$500,000 in decedent's will, together with \$371,000 in lifetime charitable gifts,” in finding sufficient charitable intent to apply cy pres). The *Othmer I* court went on to find the “requisite general charitable intent” based *inter alia* on the fact that the donors in that case had given millions of dollars, during life and at death, to numerous other charities. In this case, before its dissolution WFLC distributed \$186 million to City Opera and various constituent organizations of Lincoln Center – namely, the

Metropolitan Opera Association, Inc. (the “Met”), New York City Ballet, Inc. (with which City Opera shares the use of the Koch Theater), the Chamber Music Society of Lincoln Center, Inc., the Vivian Beaumont Theater, Inc. (now Lincoln Center Theater, Inc.), and the Philharmonic-Symphony Society of New York, Inc. (commonly known as the New York Philharmonic). Those organizations are the principal occupants of the largest and most prominent performance venues at Lincoln Center: the Metropolitan Opera House (the Met), Avery Fisher Hall (the New York Philharmonic), the Vivian Beaumont Theater (Lincoln Center Theater, Inc.), Alice Tully Hall (the Chamber Music Society of Lincoln Center, Inc.), and the Koch Theater (City Opera and City Ballet). In connection with its dissolution, WFLC distributed an additional amount in excess of \$300 million to those organizations. Schau Aff, Exhibit D. WFLC’s long-standing support of these New York City performing arts institutions therefore evidences WFLC’s general charitable intent.

Additionally, a general charitable intent ordinarily will be found when a gift or grant is general in character or gives the donee substantial discretion in the use of the funds – e.g., when the income from an endowment grant may be used for an institution’s general purposes. *Othmer I* 185 Misc.2d at 127 (finding a general charitable intent with respect to an endowment fund whose income could be applied for a charity’s “general purposes”). In the case of the Wallace Fund, the Wallace Agreement permits the funds to be used for many purposes. Special Contributions may be drawn for “new works or new productions or new performances, or to underwrite touring of new productions or repertory, or to support educational or audience outreach programs,” and Annual Contributions may be drawn for those purposes *as well as* “other priority needs identified by” Petitioner. Given City Opera’s mission of advancing repertory innovation and facilitating the public’s understanding of opera, the itemized purposes

capture virtually all of City Opera's core activities. The catch-all "other priority needs" ensures that administrative and capital needs are also captured. Indeed, one could hardly find a more general purpose than the phrase "other priority needs."

Finally, WFLC's general charitable intent is evidenced by the fact that the Wallace Agreement makes no provision for a "gift over" or a reverter of the gift to WFLC. *See Othmer I* at 127 (noting the absence of a gift over under the terms of the Othmer bequest and citing *Matter of Goehringer*, 69 Misc.2d 145, 149-50, 329 N.Y.S.2d 516 (Sur. Ct. Kings County 1972) for the proposition that "where the charitable disposition has vested and there is no specific gift over, cy pres will invariably be applied"). *See also In re Hendrick's Will*, 148 N.Y.S.2d 245, 256 (N.Y. Gen. Term 1955); *Matter of Carper*, 67 A.D.2d 333, 337 (N.Y. App. Div. 1979), *aff'd* 50 N.Y.2d 974 (1980); *Matter of Wolseley*, 814 N.Y.S.2d 893, 2005 WL 3726198, at \*2 (Sur. Ct. Suff. County 2005); *Matter of St. Charles Hosp.*, N.Y.L.J., Aug. 4, 1995, at 25, col. 6 (Sur. Ct. Suff. County 1995).<sup>7</sup>

3. The particular purpose for which the Wallace Fund was created has become impracticable to achieve.

Petitioner satisfies the third necessary condition for cy pres relief because changed circumstances have rendered impracticable certain restrictions on Petitioner's use of the Wallace Fund, namely, the restriction in Paragraph B of the Wallace Agreement requiring that the Wallace Fund be maintained "in perpetuity as an endowment fund."

A provision in a gift instrument is "impracticable" if "circumstances have changed such that literal compliance with the gift instrument is impossible or impracticable." *In re Polytechnic University*, 812 N.Y.S. 2d at 309. The "impracticability" requirement of the cy pres analysis is met here (just as it was at the time of the Oct. 28, 2008 Order) because

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<sup>7</sup> The *Wolseley* and *Charles* cases are unreported and are attached for the Court's convenience as exhibits H and I, respectively, to the Schau Supplemental Affidavit.

circumstances unforeseen to WFLC have so changed since the time the Wallace Fund was created that, without the requested relief, the continued viability of City Opera would be threatened – a circumstance that would frustrate the very purpose for which the Wallace Fund was established in the first place.

When the Wallace Agreement took effect, in April 2001, City Opera was operating at a surplus and was nearing the end of an eighth consecutive season of financial stability. Neither WFLC nor City Opera could have foreseen the many things that then happened: the terrorist attacks of 9/11, the economic downturn which hit New York City, and systemic changes in tastes and ticket-buying preferences in New York – all of which significantly slowed ticket sales and adversely affected donations. Neither WFLC nor City Opera could have predicted the extent to which escalation of fixed costs related to labor generally and union contracts in particular would increasingly burden City Opera's finances. Neither WFLC nor City Opera could have predicted that City Opera's home in the Koch Theater would be closed for renovations throughout the 2008-2009 season and for a portion of the 2009-2010 season, thereby depleting ticket revenues and hampering fundraising. Finally, neither WFLC nor City Opera could have predicted that, beginning in September 2008, at a pivotal point in City Opera's history, world financial markets would experience unprecedented turbulence and experience declines that have shrunk the value of its investments.

New York courts have granted cy pres relief for "impracticability" in situations like this one that involved an institution experiencing such severe financial distress that it threatened the institution's ability to continue its operations. *See, e.g., Knickerbocker Hospital v. Goldstein*, 41 N.Y.S.2d 32, 36 (Sup. Ct. N. Y. County 1943) (applying cy pres to permit a hospital to use as much of its endowment principal as necessary to keep the hospital operating

during a period of serious economic distress); *In re Polytechnic University*, 812 N.Y.S.2d at 311 (applying cy pres to release university from endowment restriction because “unforeseen economic events have affected the ability of the University to attract students to its programs, resulting in an operating deficit,” and noting that “it is inconceivable that [the donors] would have wanted the educational mission for the University to be frustrated because of its current situation”). In *Othmer I*, the Court applied cy pres to allow Long Island College Hospital in Brooklyn to obtain greater access to an endowment fund where the endowment fund’s income was insufficient to enable the hospital to continue its operations on a long-term basis. Facing financial straits brought about by changes in the health-care sector, the hospital sought permission to use an endowment’s historic dollar value to secure financing for capital projects, to acquire working capital, and to acquire and renovate facilities. The hospital had emphasized that these growth measures were necessary “if it is to compete successfully and survive economically in the changing health-care environment.” *Othmer I*, 185 Misc.2d at 852. The court concluded that “[i]f the hospital is forced to close, the intent and purpose of [the donors’] gifts to it will become impossible or impracticable to achieve.” *Id.*

The court also granted the same hospital further relief six years later when the hospital returned with a second cy pres application. The court determined that literal compliance with the restrictive provisions of the endowment fund was again impracticable and noted that “this court can conclude that the [donors] would want [the hospital] to continue as a hospital.” *Othmer II*, 185 Misc.2d at 128. The same is true here, where the funds obtained in the first cy pres application are insufficient to return City Opera to operating surpluses. Unlike the charity in the *Othmer* case, however, City Opera, anticipated in its prior application that it would need to return for supplemental relief.

As the *Othmer* cases and *St. Charles* both show, courts have found the impracticability criterion to be met in situations where the institution sought to right its long-term financial situation by initiating a new plan. In *Matter of Wolsley* as well, the court found that circumstances demonstrated the requisite impracticability where a hospital sought to pay down its debt and obtain financing for the “expansion and renovation of the hospital,” without which the hospital “may be forced to reduce community related programs and services which it provides at no charge or into bankruptcy.” *Matter of Wolsley*, 2005 WL 3726198, at \*2. Most recently, in *Matter of The Cooper Union for the Advancement of Science and Art*, Sup. Ct., N.Y. County, Index No. 112519/06, this Court approved the application of Cooper Union for cy pres relief authorizing it to embarking on a financing arrangement that necessitated a \$175 million mortgage on an endowment asset (the real property where the Chrysler Building is located). The proceeds of the financing were to be used to enable Cooper Union to continue to maintain high academic standards, to continue to provide a tuition-free education to its student body, and to modernize certain of its half-century old facilities.<sup>8</sup> Without the requested relief, Cooper Union showed that it could not survive in a manner that would fulfill its mission.

These cases are apposite. With the requested relief, Petitioner will be in a position to implement its new strategic and financial plan under the direction of its new General Manager and Artistic Director George Steel; but without the requested relief, Petitioner lacks the

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<sup>8</sup> A copy of the Petition filed by The Cooper Union for the Advancement of Science on September 6, 2006 is annexed as Exhibit J to the Schau Supplemental Affidavit. The Court’s Decision and Order, Exhibit K of the Schau Supplemental Affidavit, are not officially reported. One unique circumstance of the *Cooper Union* case was the sheer age of the endowment in question; it had been created in 1902 and, as such, had a low historic dollar value of \$600,000 (relative to the 21<sup>st</sup> century value of the Chrysler Building property). Hence, it was possible for cy pres relief to be granted while still setting aside \$600,000 of the mortgage proceeds in order to protect the historic dollar value of the endowment if the Chrysler Building property were lost on account of the financing. Obviously, this sort of measure is not available where (as here) historic dollar value of an endowment must be expended in order for the cy pres relief to accomplish the desired result.



resources needed to meet its obligations for the 2008-2009 fiscal year and begin the 2009-2010 fiscal year on stable financial footing. WFLC's charitable goal in establishing the Wallace Fund would undoubtedly be frustrated if the requested portion of the Wallace Fund were not made available to aid City Opera at this critical moment in its history.

4. Relief from the restrictions of the Wallace Agreement cures the impracticability and most effectively accomplishes the general charitable purpose of the donor.

In *Othmer II*, the court found that "[m]odification of the restrictions to allow a sufficient portion of the Othmer Endowment Fund to be used to reduce the accounts payable and make the capital improvements to implement [hospital's] recovery plan has the potential to keep the Hospital in operation and preserve the [donors'] overriding general charitable intent."

*Othmer II*, 12 Misc.3d at 927.

The same is true here. By enabling City Opera to borrow from the Wallace Fund in order to meet its cash needs, the proposed relief will preserve the donor's intent and thus cure the impracticability arising from the restrictions on the Wallace Fund that otherwise would prohibit expenditures or borrowings from the Wallace Fund. City Opera faces financial challenges that must be met immediately in order for City Opera to continue the tradition that has invigorated opera and arts education and supported young artists in New York City for 65 years. City Opera does not have other assets available to it that would be sufficient to see it through this transition period. It therefore seeks this relief as matter of necessity.

Not only is City Opera seeking to borrow no more from the Wallace Fund than it requires to weather the transitional period, but the proposed relief also directs City Opera to restore to the Wallace Fund the amounts expended from it as part of the relief obtained in this Petition to the extent it later has net financial resources that may be prudently used for that purpose. Petition ¶ 65. That aspect of the proposed relief demonstrates that it is narrowly

tailored to addressing City Opera's current financial needs and at the same time ensuring the preservation of the Wallace Fund in perpetuity. The plan calls for City Opera to reduce its operating budget to a level that will be financially sustainable well into the future, while maintaining its hallmark commitment to artistic excellence and innovation. Indeed, once the elements of City Opera's new strategic plan are in place, City Opera projects an operating surplus of more than \$1.4 million for 2010-2011. City Opera also projects that it will be able to restore as much as \$2,000,000 to the Wallace Fund by the end of 2009-2010 and annually thereafter until the Wallace Fund is restored to eighty percent of its historic dollar value, a benchmark imposed by the Oct. 28, 2008 Order. *See Exhibit A, Schau Aff.*

In sum, absent the requested relief, City Opera lacks sufficient resources to cover its expenses and meet its obligations during the remainder of its current fiscal year, much less to commence its 2009-2010 season next fall in the Koch Theater. The requested relief is therefore critical to the survival of City Opera; without it, City Opera will not be able to bridge the gap before it is again operational in its newly renovated home. If granted, however, the requested relief will see City Opera through this period of transition and enable it to achieve steady state by the end of 2009-2010, thereby fulfilling a core purpose of having a Wallace Fund at all: to ensure that City Opera remains one of the leading cultural institutions of New York City.

## CONCLUSION

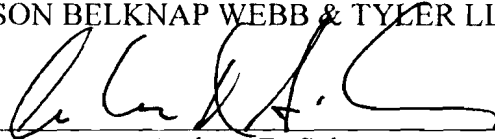
For the foregoing reasons and as shown in the Petition, the Affidavit of Emergency of Andrew D. Schau dated April 9, 2009, the Supplemental Affidavit of Andrew D. Schau dated April 9, 2009, the Affidavit of Michael M. Kaiser dated March 31, 2009, and the Attorney General of the State of New York having provided his Affidavit of No Objection to the relief set forth in the Petition, Petitioner has shown that it satisfies the required tests for application of the cy pres doctrine pursuant to EPTL § 8-1.1(c) and the grant of the relief set forth in the Petition.

Dated: New York, New York  
April 9, 2009

Respectfully submitted,

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